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CONTENTS.

	Page
INTRODUCTION	1
CHAPTER I.—The Law relating to the Succession to Property among the Sunnis and the Shiahs	41
CHAPTER II.—The Conflict of Law	124
CHAPTER III.—The Status of Legitimacy	148
CHAPTER IV.—Adoption, Filiation, and the Doctrine of Ac- knowledgment	166
CHAPTER V.—The <i>Patria Potestas</i> .—The Right of Jabr	179
CHAPTER VI.—The Right of the Mother to the Custody of her Children (<i>Al Hazānat</i>)	195
CHAPTER VII.—The Status of Marriage.—Capacity.—Form of Marriage.—Prohibitions against Mar- riage	215
CHAPTER VIII.—Illegal and Invalid Marriages.—Right of Objection possessed by a <i>Wali</i> .—Right of Option.—Causes for which Marriage may be Cancelled.—Effects of Apostasy on the Status of Marriage	254
CHAPTER IX.—Rights and Duties of the Married Parties.— Ancient Customs.—Maintenance.—Ab- sent Husband.—Conjugal Domicil	278



	Page
CHAPTER X.—Antenuptial Settlements.— <i>Mahr</i> .—Prompt and Deferred <i>Mahr</i>	298
CHAPTER XI.—Dissolution of the Marriage Contract.—Pre-Islamic Institutions.— <i>Talâk</i> .—Differences among the Schools	330
CHAPTER XII.—Dissolution of the Marriage Tie proceeding from the Wife (<i>Khula</i>).— <i>Mubârat</i>	354
CHAPTER XIII.—Dissolution of the Status of Marriage by a Decree of the Judge.—For what Causes.— <i>Laîn</i> .—Difference among the Schools.— <i>Talâk-ul-Innîn</i>	374
CHAPTER XIV.—The Status of Infancy.—Personal Emancipation.—Emancipation of Property.—Indian Act IX. of 1875	401
CHAPTER XV.—Guardianship or Tutelage.—Its Object and Scope under the Mahommedan Law.—The Father the Primary Guardian.—Testamentary Guardians.—Indian Act XL. of 1858.	408



P R E F A C E .

To those not born and bred within the pale of Islâm, the study of the Mussulman law is usually attended with great difficulties. The works which at present exist in the English language are few in number; and though France has been more prolific in this respect, the valuable contributions of the Moslems to the science of jurisprudence and law are, for the most part, wrapped in the intricate folds of a language as difficult to acquire as it is copious in its diction.

In India, even among educated Moslems, a knowledge of the Mussulman law, if not actually obsolete, has become extremely rare. Few cultivate it as a science, or study it analytically as a branch of comparative law. Those who apply themselves to its study are satisfied with a barren and unprofitable acquaintance with the simple rules of inheritance. This is the consequence of the policy inaugurated by Lord William Bentinck. Prior to his time, the Mussulmans occupied the foremost position among the people of India. The cultivation of their law and their literature was encouraged by successive British governors; their traditions were respected, and they themselves were treated with a certain amount of consideration due to the former rulers of the land. All this changed



under Lord William Bentinck's administration, and the Indian Mahommedans were relegated into the cold shade of neglect. Their institutions gradually died out, and the old race of *Moulvis* and *Muftis*, who had shed a lustre on the reigns of the Marquis of Wellesley and the Marquis of Hastings, became extinct. Whilst the French in Algeria were endeavouring to give a new impetus to the cultivation of Moslem law and literature by subventions and Government assistance, and whilst they were utilising the indigenous institutions with the object of improving the condition of their subjects, the British in India allowed the study of every branch of Mahommedan learning to fall into decay. The mischief which has resulted from this mistaken policy can hardly be over-rated. Owing to an imperfect knowledge of Mussulman jurisprudence, of Mussulman manners, customs and usages, it is not infrequent, even now, to find cases decided by the highest law courts against every principle of the Mahommedan law. It is not surprising, therefore, to learn that every miscarriage of justice adds to the long roll of indictment which the popular mind has framed against the British rule in India. Latterly a desire, no doubt, has been evinced by some of the local governments—notably by the Governments of Bengal and of Madras—to repair to some extent the evils caused by the neglect of half a century. Nothing tangible, however, has yet been achieved towards securing efficient administration of justice in Mahommedan cases.



Owing to the broad divergences existing between the various legal schools, no branch of the Mahomedan law is perhaps more difficult to master than that relating to personal status.

The treatise which I now place in the hands of the public is intended to obviate partially those difficulties, and supply in some measure the want of a compendious work on the Mahomedan personal law. I have embodied in it, the substance of a series of discourses, delivered by me in several sessions as Lecturer on Mahomedan Law at the Presidency College of Calcutta. To this I have added a synoptical sketch of the Sunni and the Shiah law of inheritance.

I have endeavoured in the following pages to deal with the subject from a comparative and analytical point of view. How far I have succeeded, I leave to the public to judge.

I venture, however, to hope that as this treatise is entirely *sui generis*, and tentative in its character and scope, a generous reception will be accorded to it, in spite of defects which it must necessarily contain.

In order that this volume should be useful to the practical lawyer as well as to the student, I have carefully verified the legal dicta and scrupulously given my references.

Before mentioning the original authorities I have consulted, a few remarks on the works already in existence in the European languages will not, I think, be without interest to the reader.

Macnaghten's "Principles and Precedents of the



Mahommedan Law," Hamilton's translation of the Persian version of the "Hedâya," Baillie's "Digests," Shama Churn Sircar's "Lectures," and Mr. Rumsey's "Law of Inheritance," are the only works in the English language which require any specific mention. Until recently, Macnaghten's work was regarded as the greatest authority on Mussulman law, though latterly it has fallen much in the estimation of lawyers and judges. I venture, however, to think that, in spite of many defects and frequent inaccuracies, Macnaghten's synopsis of the Hanafî and the Shiah law may safely be regarded as the most useful elementary treatise for students preparing for public examinations.

Hamilton's translation of the "Hedâya" is of great practical value to those who can discriminate between the doctrines of the various Sunni schools. The difficulty, however, which lawyers frequently have in finding out in the "Hedâya," the principles actually in force among the Hanafis, detracts much from its usefulness.

Mr. Baillie's "Digests" are a free paraphrase of portions of the "Fatâwa-i-Alamgîrî" and the "Sharâya-ul-Islâm." They are works of great merit, and afford considerable assistance to all engaged in the study of Mahommedan law. In spite of Mr. Baillie's great erudition, inaccuracies are to be found, to one of which prominent attention was directed in the case of *Musst. Asloo*.*

* 20 "Weekly Reporter."



The usefulness of these "Digests" would have been greatly enhanced, if Mr. Baillie had thought it worth his while to give in every case, as he has done in some instances, the references to the authorities he was paraphrasing or translating. This omission has been to some extent supplied by Baboo Shama Churn Sircar, whose lectures in other respects are, in the main, transcriptions of Baillie's "Digests." His introductions are of great value to all lawyers anxious to study scientifically Mussulman jurisprudence.

Mr. Rumsey's treatise is an extremely valuable and comprehensive work on the Hanafî law of inheritance.

The French works on Mussulman law and Mussulman jurisprudence throw into shade anything existing in the English language. D'Ohsson's "*Tableau Générale de la Empire Ottoman*," published under the patronage of the King of Sweden in 1728, will always remain a magnificent monument of Western genius and industry. It contains by far the most complete and correct summary of the Hanafî law, civil, criminal, political and moral, in force in the Ottoman Empire.

Besides D'Ohsson's grand work, Perron, Sautayra, Querry, Sicé, Lasalle, De Ménerville, Du Caurroy, Vincent, and various others have enriched the French language with valuable contributions on Mahommedan law. All these authorities have proved of great value to me in preparing the present treatise.

The historical portion of my introduction is founded on the "*Al-Kâmil*" of Ibn-al-Athîr, and the juridical



on Imâm Fakruddîn Râzî's "Al-Mahsûl" (المحصل),* the "Mukkadamât" of Ibn-Khaldûn,† the "Millalwan-nihal" of Shahrastâni,‡ and D'Ohsson's "Tableau Générale."

The principles of the Shiah law have been derived from the "Sharâya-ul-Islâm," the "Mafâtîh," the "Irshâd-i-Allamah," and the "Jâma-ush-Shattât." This last work is a valuable digest of Shiah cases, and the dicta contained therein have an authority equal to those of the "Fatâwa-i-Alamgîrî" among the Hanafis. Besides the above I have also consulted the "Nail-ul-Marâm," the "Jâma-i-Abbâsi," the "Mabsût," and the "Tahrîr-ul-Ahkâm." For Shiah traditions I have referred to the "Bahâr-ul-Anwâr."

For the Hanafî law, I have consulted the two "Fatâwas," the "Kanz-ud-Dakâik" (Persian translation), the "Hedâya" (English and Persian translations), the "Fusûl-i-Imâdiyah," the "Inâyah," the "Kifâyeh," the "Durr-ul-Mukhtâr," the "Radd-ul-Muhtâr," "Ibrâhîm Halebî," &c.

For the Shâfeî and Mâlikî law, the "Kitab-ul-Anwâr," the "Al-Muharrar," the "Ikhtilâf-i-Aimmah," Perron's translation of "Sîdî Khalîl," Sautayra, &c.

In addition to those already mentioned, I have referred to a number of other works all of which are specifically mentioned in the notes.

Whilst acknowledging the various authorities to

* India Office Copy, A.b., b. 319.

† Du Slane's Translation, "Prolégomènes d'Ibn Khaldoun."

‡ Cureton's edition.



whom I have been greatly indebted, I desire in this place to convey my thanks to Dr. Röst and Mr. A. G. Macpherson, Legal Adviser to the Secretary of State for India, for allowing me unrestricted use of the India Office Oriental and Law Libraries.

The importance at this moment of the study of the Personal Law of the Mahommedans cannot, I think, be overrated.

Belonging myself to the little known, though not unimportant philosophical and legal school of the Mutazalas, and thus occupying a vantage ground of observation as regards the general progress of ideas among other sections of the Mussulmans in India, I cannot but observe the movement which has been going on for some time among them. The advancement of culture, and the development and growth of new ideas, have begun to exercise the same influence on them as on other races and peoples. The young generation is tending unconsciously towards the Mutazalite doctrines, whilst the old, if Shiah, become Akhbârîs, and if Sunnis, Puritans of the Wahâbî type.

It must not be supposed, however, that this movement results from the weakening of the Islâmic faith. It originates more from the desire to revert to the pristine purity of Islâm, and to cast off the excrescences which have marred its glory in later times. The progress of thought is chiefly evidenced by the views which the great majority of Moslems now entertain respecting the institutions of polygamy, slavery, and the facility of divorce without the sanction of the



Kâzi. Whatever may have been the necessity for polygamy in the earliest stages of society, in modern times it can only be regarded as an unmitigated and unendurable evil. Owing to the growth of these views and a better appreciation of the spirit of the Koran, the Moslems of India generally look upon polygamy as opposed to the Islâmic precepts.

To me it appears that great changes are imminent in the social institutions, and the personal laws of the Indian Mussulmans. How they will be achieved, whether by a general synod of Moslem doctors or by the direct action of the legislature, it is impossible to say.

In view of this imperceptible current of ideas, imperceptible perhaps to outsiders, but not to those who live within the bosom of Islâm, it is particularly necessary that those who hold in their hands the destiny of India should pay attention to the laws of the only homogeneous people in that country.

Should this treatise prove useful in extending a more general knowledge of the Personal Law of the Mahommedans, I shall consider myself amply repaid for the time I have devoted to this, my holiday task.

Reform Club,

20th Dec. 1880.



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101

INTRODUCTION.

I.

THE Mahommedan jurisprudence occupies a pre-eminent position among the various systems which have, at different times, been in force among different communities. Considering the circumstances under which it originated, the difficulties it had to contend with, and the backward condition of the people among whom it attained its development, it may be regarded as one of the grandest monuments of human intellect. The legislation of Mohammed has, accordingly, a special significance for philosophic observers whom the study of the progress of mankind, as evidenced in the laws of society, attracts and interests. The resemblance which the Islâmic regulations bear to pre-Mahommedan institutions in some of their essential features deserves careful consideration, as it serves to show the points of contact between the old conditions of society, stigma-



tised by the Mussulmans as the *Iyām-i-Jāhilyat* ("the days of ignorance") and the reformed system. This resemblance has induced some critics to charge Mohammed with plagiarism. It seems to us, however, that the charge is founded upon an erroneous conception of Arab society as it existed in those days. At the time when Mohammed promulgated his laws, the Jews were, probably, the only people inhabiting the Arabian peninsula who possessed any organic institutions; they formed strong communities in the midst of the pagan Arabs, governed by their own special code. The intimate connection which from time immemorial existed between the Arabs and the Jews, joined to the belief that they were both descended from a common stock, had tended to engraft many Jewish ideas upon Arab manners and customs. In the relations of domestic life especially, the influence of the Jews was most strongly marked. Mohammed, in his efforts to introduce a purer faith and a healthier organisation among his people, did not so entirely overlook the exigencies of society and the requirements of human growth as to denounce all existing institutions, the inevitable result of which would have been to reduce everything to chaos. His constructive mind perceived in them the germs of development, and accordingly he allowed them a place in his system, with such modifications and alterations as would bring them into harmony with a progressive condition of society. But there can be little doubt that the vestiges of ancient and archaic manners and customs in Mussulman jurisprudence are more or less temporary in their character.

Whilst the similarity of the personal law of the Mahomme-



dans to the Hebraic domestic regulations can be satisfactorily explained by the presence of the Jews in the midst of the Arabs, the resemblance which certain features of the Mussulman law bear to Roman jurisprudence does not admit of so easy a solution. *Ibn-i-Khaldûn* explains it as the effect of Byzantine learning on Saracenic thought. The Abbasside sovereigns were, no doubt, surrounded by men versed in Greek and Roman literature and science. It is not unlikely that the influence of these scholars and philosophers extended to the jealous circle of the legists. It is also possible that the remains of Byzantine learning in Syria and Egypt may have affected the juridical conceptions of the men who, in the second and third centuries of the Mussulman era, built up the Sunni system of law. The principles of the law of pre-emption, with its fine distinctions regarding servitudes, coparcenary, &c., give rise to an impression that, though the foundations of the law were laid in Hijaz, the finishing touches were given in places where foreign conceptions had grown up round purely Saracenic ideas. Nevertheless, it is difficult to say, with any approach to historical accuracy, that Mussulman jurisprudence was really influenced by the Roman civil law. The position, therefore, of the Mussulman legal system seems to be this, that whilst the major portion of its rules regarding domestic institutions bears the closest analogy to the Hebraic laws, the principles which regulate the dispositions of property have little in common with the Hebraic system; whilst their resemblance, in certain instances, to the principles of the Roman jurisprudence seems to be the result of accident.

The Mussulman law is founded essentially on the Koran.



4 PERSONAL LAW OF THE MAHOMMEDANS.

It contains the fundamental principles which regulate the various relations of life; the religious, civil, and criminal laws which provide for the constitution and continuance of the body politic; and even the germs of political rules and social economy. The absence of a systematic arrangement, which has been frequently considered as its greatest defect, is explained by the circumstance that the code was gradually built up during the lifetime of the Prophet. The moral principles and the legal rules, which make up the work, were enunciated, not simultaneously as a completed code of laws, but in accordance with the exigencies of the moment and the requirements of each special case.

The silence of the Koran on many points, legal as well as doctrinal, is supplemented by the oral precepts delivered from time to time by the Prophet, and by a reference to the daily mode of his life as handed down to posterity by his immediate followers. The unhappy religious schism which at the present moment divides the Mahommedan world into the two great sects of the Shiabs and the Sunnis, owes its origin chiefly to the relative value attached to the various traditions, according to the source from which they are received. Very shortly after the decease of the Arabian lawgiver, it became habitual with some of those who had been, during his lifetime, intimately associated with him, but who had never lost their inimical feelings towards his family, to throw into the background all the traditional sayings of the Founder which appeared to support the rightful claims of his son-in-law to the Caliphate. The traditions which purport to be handed down from Abû Huraira, Âyesha, and others, bear evident traces of jealousy



towards the members of Mohammed's family.* These traditions are accordingly rejected, with few exceptions, by the partisans of the *Ahl-i-Bait*.

Abû Bakr, who was elected to the Caliphate immediately after the decease of the Prophet, had directed that the traditional sayings should be collected and embodied in an authoritative work before they had faded from the memory of men; but he did not survive to see it completed. The first collection did not appear until the reign of Osmân, the third Caliph.

The question of the *Imâmât*, the spiritual headship of the Mussulman commonwealth, forms the most distinctive feature of difference between the Sunnis and the Shiahs, and gives a characteristic complexion to the juridical doctrines of the two schools. The Shiahs repudiate entirely the authority of the *Jamdet* (or the universality of the people) to elect a spiritual chief who should supersede the rightful claims of persons indicated by the Founder of the Faith; whilst the Sunnis regard the decisions of the assemblies, however obtained, as of oecumenical importance. The question came up for discussion and settlement immediately on the decease of Mohammed, when it became necessary to elect a Caliph or successor to the Prophet to assume the leadership of Islâm. The Hashimites, the kinsmen of Mahommed, maintained that the office belonged by right to Ali,† as one who had been pointed out by the Prophet as his successor. The other Koreish-

* The *Ahl-i-Bait*, "People of the House."

† The son-in-law and cousin of the Prophet. He married Mohammed's daughter, Fâtima, from whom the descendants of Mohammed take their name of *Banî-Fâtima* (the Fatimides).



ites, who were traditionally hostile to the Banî Hâshim, insisted upon proceeding by election. Whilst the Banî-Hâshim were engaged in the obsequies of Mohammed, Abû Bakr was elected to the office of Caliph by the votes of the Koreish.

Abû Bakr died in the third year of his Caliphate, and was succeeded by Omar (*Ibn-al-Khattâb*). Under this great man the conquest of Syria, Egypt, and Persia was achieved by the Moslems. Upon his decease the Caliphate was offered to Ali on condition that he should govern in accordance with the precedents established by the two former Caliphs. Ali declined to accept the office on those terms, declaring that in all cases respecting which he found no positive law or decision of the Prophet, he would rely upon his own judgment. This notable declaration forms another point of difference between the Shiahs and the Sunnis. The Caliphate was then offered to Osmân,* who consented to the terms imposed by the electoral body. The legal divergence between the Sunni and the Shiah schools dates virtually from this epoch. The willingness of Osmân to follow implicitly the precedents established by Abû Bakr and Omar, without any question as to their applicability to the ever-varying exigencies of human life, impressed a distinctive character upon the Sunni doctrines. Both Abû Bakr and Omar had, during their Caliphates, deferred to Ali's exposition of the law, and judgments were invariably given according to his interpretation of the traditions. Osmân seems to have set a different example. This well-intentioned but weak chief, governed entirely by his secretary and kinsman, Merwân, after-

* Osmân was the son of Affân the son of Ab-ul-aff the son of Ommiah.



wards a Caliph himself, was killed, after a short and troubled reign, by the revolted Egyptian soldiery led by Mohammed, the son of Abû Bakr. Upon his death Ali was elected to the Caliphate. His accession was the signal for two fierce revolts on the part of the opposite faction. The one which was headed by Âyesha, the daughter of Abû Bakr, was suppressed without much difficulty; the other was more successful. Osmân had, during his lifetime, appointed one of his kinsmen, Muâwiyah, the son of Abû Sufiân, to the governorship of Syria. This ambitious chief perceived in the murder of Osmân an opportunity for his own aggrandisement, and the insurrection raised by him proved, indirectly, the cause of the many disasters which have befallen Islâm.* Defeated in several consecutive battles, he appealed to arbitration, which was agreed to by Ali with the object of avoiding further bloodshed. Abû Mûsa-al-Ashâry was appointed an arbitrator on behalf of the House of Mohammed, and Amr-ibn-ul-Âs on behalf of Muâwiyah. Amr† persuaded Abû Mûsa that, with the view of healing the wounds which the differences between Ali and Muâwiyah had inflicted on the Moslem world, it was necessary to set aside both chiefs and elect another Caliph. Abû Mûsa agreed to the suggestion, and on the people assembling to hear the verdict of the arbitrators, he pronounced the deposition of both Muâwiyah and Ali. He was followed by Amr-ibn-ul-Âs, who declared that he agreed with Abû Mûsa in deposing Ali, but that he confirmed Muâwiyah in his office. The boldness of the artifice, and the shamelessness with which it was carried into

* 11 Safar A.H. 37, 28 July A.C. 657

† The Amru who conquered Egypt under the Caliph Omar.



effect, struck with dismay all those who had seen in the arbitration a means for preventing further bloodshed in Islâm. This proceeding of Amr-ibn-ul-Âs exasperated the Fatimides, and both parties separated vowing undying hatred towards each other. Ali was shortly after assassinated whilst engaged in prayer in a mosque at Kûfa. His assassination enabled Muâwiyah to consolidate his power both in Syria and Hijâz.

Until the accession of this chief to the office of the Caliphate, which the stern virtues of the early Caliphs had sanctified and adorned, no distinctive appellation was assigned to or assumed by either party. The partisans of Ali were known simply as the Banî-Hâshim. Under Muâwiyah, the followers of the House of Mohammed began to be called "Shiahs" or "Adherents"; whilst the faction which advocated the principles of election in preference to hereditary succession adopted the name of *Ahl-i-Sunnat wa Jamâet* ("People of the Traditions and the Assembly.") The Fatimides adopted green, the colour of the Prophet, as the symbol of their cause; the Banî-Ommiah, on the other hand, assumed white for their standard. Up to this time the divergence between the two factions was chiefly political and dynastic. Their doctrinal and legal differences began now to assume the type and proportions they retain at the present moment. The Shiahs reject not only the decisions of the œcumenical councils, but also all traditions not handed down by Ali or his immediate descendants—those who had seen the Prophet and held familiar intercourse with him.

According to the Shiah doctrines, the oral precepts of the Prophet are in their nature supplementary to the Koranic



INTRODUCTION.

9

ordinances, and their binding effect depends on the degree of harmony existing between them and the laws of the Koran. Thus, those traditions which seem to be in conflict with the positive directions in the text are considered to be apocryphal. The process of elimination is conducted upon certain recognised principles founded upon logical rules and definite data. These rules have acquired a distinctive type among the *Mutazalas*, who have eliminated from the *Hadīs Kudsi* (the holy traditions) such alleged sayings of the Prophet as appeared incompatible and out of harmony with his developed teachings as explained and illustrated by the philosophers and jurists of his race.

The Sunnis, on the other hand, base their doctrines on the entirety of the traditions. They regard the concordant decisions of the successive Caliphs and of the general assemblies (*Ijmaʿ-i-Ummat*) as supplementing the Koranic rules and regulations, and as almost equal in authority to them.

According to the Sunni doctrines, the sources of the Mahomedan law are invariable in their order and limited in their number. With reference to these fundamental bases of jurisprudence, as they are called, there is little or no divergence among the several branches of the Sunni school, though they differ much in their mode of interpretation and exposition of the laws. (1) The Koran; (2) The *Hadīs* or *Sunnat* (traditions handed down from the Prophet); (3) the *Ijmaʿ-i-Ummat* (concordance among the followers); and (4) the *Kiyās* (private judgment), constitute the bases upon which Sunni jurisprudence is essentially founded. The *Hadīs* (pl. *Ahādīs*) embraces (a) all the words, counsels, and oral laws of the Prophet (*Kawl*);

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(b) his actions, his works, and daily practices (*FyI*); (c) and his silence (*Takrîr*), implying a tacit approbation on his part of any individual act committed by his disciples. The rules deduced from these subsidiary sources vary considerably in respect of the degree of authority which is attached to them. If the rules, or traditional precepts, are of public and universal notoriety (*Ahâdis-i-mutwâtîrêh*), they are regarded as absolutely authentic and decisive. If the traditions, though known publicly by a great majority of people, do not possess the character of universal notoriety, they are designated as *Ahâdis-i-mashhûrâ*, and stand second in rank to the *Ahâdis-i-mutwâtîrêh*; whilst the *Akhbâr-i-wâhid*, which depend for their authenticity upon the authority of isolated individuals, have little or no value attached to them. Thus every tradition purporting to be handed down by the contemporaries and companions of the Prophet, regardless of their actual relationship to him, is considered to be authentic and genuine, provided certain arbitrary conditions framed with the view of testing the value of personal testimony are complied with.

(3.) *Ijma'â-i-Ummat* implies general concordance. Under this collective name are included all the apostolic laws, the explanations, glosses, and decisions of the leading disciples of the Prophet, especially of the first four Caliphs* (the *Khulafâi Râshidîn*) on theological, civil, and criminal matters.

(4.) *Kiyâs*, the exercise of private judgment, forms the principal point of difference among the four subdivisions of the Sunni school of jurisprudence.

The Shiâhs do not admit the genuineness of any tradition

* Abû Bakr, Omar, Osmân, and Ali.



not received from the *Ahl-i-Bait* ("the people of the House") consisting of Ali and Fâtima and their children, and repudiate entirely the validity of all decisions not passed by their own spiritual leaders and Imâms. In the application of private or analytical judgment and in drawing conclusions from the ancient precedents they also differ widely from the Sunnis.

Before we trace, however, the development of the Sunni schools, it is necessary to sketch briefly the fortunes of the House of Ali, for the temporal condition of the Fatimides moulded the doctrines of their followers in many respects. On the assassination of Ali, Hassan, his eldest son, was raised to the Caliphate in Irâk (Mæsoptamia). Fond of ease and quiet, the bitter dynastic jealousies and religious hatred of the various factions which divided the Moslem world wearied him, and he soon abandoned the high position to which he had been elevated, and retired into private life. The animosity of the Ommiades pursued him even in retirement, and he was poisoned not long after at the instigation of Yezîd, the son of Muâwiyah. This Domitian of the House of Ommiah succeeded in inveigling into his power Hussain, the second son of Ali, and massacred him, together with almost all the male descendants of the Prophet, on the plains of Kerbala, whilst they journeyed towards Kûfa. One sickly lad alone escaped this ruthless butchery. This youth, who also bore the name of Ali, was afterwards surnamed *Zain-ul-abedîn* ("the Ornament of the Pious") for his piety and patience. He was the son of Hussain by the daughter of Yezdjard, the last Sassanide King of Persia, and in him was perpetuated the House of Mohammed. He represented also in

• 12 PERSONAL LAW OF THE MAHOMMEDANS.

his mother's right the claims of the Sassanians to the throne of Irân.

From this time the descendants of the Prophet became the objects of fierce persecutions on the part of the Ommiades. The jealous suspicion and untiring animosity of the children of Abû Sufiân followed them everywhere without mercy. During the reign of Omar-ibn-Abdul Azîz, the seventh Caliph of the House of Ommiah,* the fury with which the Fatimides had been persecuted to some extent abated—only, however, to burst forth anew upon his death. In the year A.C. 747 (127 Hijra) Abul Abbâs Saffâh† destroyed the Ommiades and founded upon their ruin the dynasty of the Abbassides.

The halo of veneration which surrounded the Banî-Fâtima in the eyes of the people, and their universal popularity, often provoked the vengeance of the Banî-Abbâs, and formed an excuse for continuous repression and frequent persecution. This lasted until the reign of Abdullâh-al-Mâmûn, the noblest Caliph of the House of Abbâs, who, on his accession to the Caliphate, resolved to place the children of Fâtima on the throne. He accordingly named‡ Ali-ibn-Mûsa, surnamed Rezâ ("the acceptable or agreeable"), the eighth Imâm of the Fatimides, as his successor, and gave his sister Umm-ul-Fazl in marriage to this prince.§ He also abandoned the black, the Abbasside colour, in favour of the green, which, as stated before, was the recognised standard of the Fatimides.

* A.H. 99, A.C. 717.

† A descendant of Abbâs (one of the uncles of the Prophet), from whom the family derived the name of Banî-Abbâs.

‡ A.H. 201, A.C. 816.

§ The Razawy Syeds are descended from the Imâm Ali-Mûsa ar Rezâ.

Al-Mâmûn also adopted the advanced doctrines of the Muta-zalas, the rationalists of Islâm, and tried to introduce their teachings throughout the empire, but the fanaticism of his people proved too powerful for him. Ali-ibn-Mûsa ar-Rezâ was poisoned by the infuriated Abbassides, and Mâmûn was forced to resume the black as the colour of his House. The tolerance shown by him to the Fatimides was continued by his two immediate successors (Mutassim and Wâssik). The accession of Mutawakkil* was the signal for a new and fierce persecution which lasted during the whole fifteen years of a reign signalised by gross cruelty and debauchery. He was succeeded by his son Muntassir, whose first care was to restore the tombs of Ali and Hussain, destroyed by Mutawakkil, and to re-establish the sacredness of their memory so wantonly outraged by his father. The sagacity of this Caliph was imitated by his successors, and some degree of toleration was thenceforward extended to the Shiahs. In the year 334 A.H. (A.C. 945) Muizuddowla (the Deilemite), of the House of Buwaih, became the Mayor of the Palace at Bagdad. An enthusiastic partisan of the Fatimides, he entertained, at one time, the design of deposing the Abbasside Caliph Mutiullah, and placing in his stead some scion of the House of Ali, but he was restrained by motives of policy from carrying this project into effect.

Muizuddowla also instituted the *Yeum-i-âshûra*, the day of mourning, in commemoration of the martyrdom of Hussain and his family on the plains of Kerbala.†

* A.H. 232, A.C. 847.

† This ceremony, under the name of *Ashrai-Moharram*, is now observed throughout the Shiah world.



In the year A.H. 645 (A.C. 1247) under Mutassim Billah another fierce persecution of the Shiahhs broke out, the consequences of which proved, in the end, disastrous to Saracenic civilisation, engulfing in one common ruin the western Asians. Impelled by the perfidious counsels of the fanatics who surrounded him, this imbecile Pontiff of the Sunni Church, doomed the entire male community of the Shiahhs to massacre.* By a terrible edict, unparalleled in the history of persecutions, he permitted the orthodox to plunder the goods, demolish the houses, ravage the fields, and reduce the women and children of the Shiahhs to slavery. This atrocious conduct brought upon the ill-fated city of Bagdad the arms of the avenging Hulákû, the grandson of Chengîz. For three days the Tartar chief gave up the town to rapine and slaughter. On the third day the thirty-seventh Caliph of the House of Abbâs was put to death with every circumstance of ignominy; and so ended the Abbasside dynasty.

The persecutions to which the Shiahhs were from time to time subjected, and the mysterious disappearance of their last Imâm, have induced among them the belief that though *ghâib* (absent) he is yet alive, and that he will soon make his appearance to lead them to victory. Partly in consequence of this belief, and partly as a result of the repression from which they have invariably suffered, the Shiahhs have entirely dissociated the secular from the spiritual power. In Shiah countries the Church and the State are distinctly separate

* This persecution of the Shiahhs finds a parallel only in that suffered by the Albigenses and the Hnguenots. The stake, however, was never adopted by the "orthodox" Moslems.



from each other. Though a Shiah sovereign bows to the authority of the *Mujtahids* (expounders of the law), he submits to them not so much as spiritual chiefs, but rather as counsellors whose views ought to be adopted in secular matters, as the reflex, probably, of the opinions of the Invisible Leader or Imâm. Until the Saffâvian sovereigns* made the Shiah creed the State religion of Persia, it was the religion of a persecuted and hated sect.

The effect of this separation of the spiritual from the temporal power is most clearly marked in the doctrine of Escheats. According to the Shiahs, there is no escheat to the *Bait-ul-Mâl* (the public treasury). The idea of a *Bait-ul-Mâl* is "abhorrent" to the Shiah creed.† All escheats, which occur only in cases where the deceased leaves no possible heir, go to the spiritual Imâm, and in his absence (*ghîbat*) to his representative (the *Mujtahid*), who distributes the proceeds among the poor of the intestate's native city.

The Shiahs are divided into several sub-sections. For example, the *Asnâ Asharyas* or *Imâmias* (the followers of the twelve Imâms),‡ the *Ismailyas* (the followers of Ismail, one of the

* Shah Ismail Sûfî was the founder of this dynasty in the sixteenth century of the Christian era.

† *Jâma-ush-Shattât*, Book on inheritance.

‡ Different branches of the Alides or Fatimides have ruled under the different denominations of Ameer, Imâm, Sharif, and Caliph, in different parts of the Mussulman world, such as the Bani Ukhaydur, the Bani Mûsa, the Bani Kitadah at Mecca, the Bani Taba-Taba in Northern Yemen, the Bani Ziyâd in Southern Yemen, the Bani Idris in Morocco, the Bani Fâtima (Fatimides) in Africa and Egypt. The order in which the Shiahs recognise the Imâms is as follows :—

(1.) Ali (A.H. 35, A.C. 656).

(2.) Hassan (A.H. 40, A.C. 660).

(3.) Hussain (Shahîd-i-Karbela, the martyr of Kerbela) (A.H. 50, A.C. 670).

sons of Jâfer-i-Sâdik, the sixth Imâm), the *Zaidiyas*, the *Bâtin-yas* (the allegorists), &c. They differ from each other not so much on the interpretation of the law as on doctrinal points. The school of the Mutazalas, regarded by Shahrastâni and others as an offshoot from the Shiah branch, differs from the parent stock in essential particulars. The rise of this independent school forms one of the most interesting features in the history of Islâm. It originated in the secession of Wâsil ben Atâ, a contemporary of Abû Hânîfa, from the doctrines taught by Imâm Hassan al Basri (of Bussorah).

Hassan was educated in the school of the early Fatimide philosophers, and the liberality of his views was in remarkable contrast to that of his age. Wâsil imbibed knowledge at the same source, but he separated from Hassan on the question of free will and predestination, and founded a school of his own. His disciples have, from the fact of his secession, assumed the designation of Mutazalas or *Ahl-ul-Itizâl* (Separatists or

- (4.) Ali (*Zain-ul-âbedîn*) (A.H. 60, A.C. 679).
- (5.) Mahommed Bâkir (A.H. 94, A.C. 712).
- (6.) Jâfer-i-Sâdik (A.H. 117, A.C. 734).
- (7.) Mûsa Kâzim (the "Patient") (A.H. 148, A.C. 765).
- (8.) Ali ibn Mûsa ar Rezâ (A.H. 183, A.C. 799).
- (9.) Mohammed Taki (A.H. 203, A.C. 818).
- (10.) Ali Naki (the "Pure") (A.H. 220, A.C. 835).
- (11.) Hassan-i-Askery (A.H. 254, A.C. 868).
- (12.) Mohammed-al-Mehdy (A.H. 260, A.C. 873).

This last Imâm disappeared, according to the Shiah belief, in a grotto at *Surramun-Râd* (Sirmanrey) near Kâfa, in the twelfth year of his age. He is believed to be still alive, and they look forward with earnest anticipation to his reappearance to re-establish the universal Caliphate and to restore the purity of the human race. The Sunnis believe that he is not born yet, and that he will appear towards the close of the world with Jesus Christ. These two different views have two different bearings on the law, as is shown in the text.



Protestants). Wâsil soon formulated the principles which constituted the basis of his difference from the other existing schools. His impulsiveness often led him to overstep the limits of moderation in his antagonism to intellectual tyranny; yet the general rationalism which distinguished his system of philosophy and jurisprudence from every other, attracted the most advanced and cultured minds to his side. Imâm Zamakhshri (the author of the *Kasshâf*), Abul Hassan Ali ul Massoudi, "Imâm, historian, and doctor,"* the authors of the *Rouzat-us-Safâ* and *Habib-us-Siyar* were all Mutazalas. There can be no doubt that the moderate Mutazalas represented the views of Ali and the most liberal and learned of his early descendants, for the doctrines of the Fatimides bear a strong analogy to those of the school founded by Wâsil and reformed by Zamakhshri.†

It is a well-known fact that the chief doctors of the Mutazalas were either Fatimides themselves or were educated under the Fatimides. The Mutazalas maintain that justice is the animating principle of human actions, justice being the embodiment in action of the dictates of reason. They maintain further that there is no eternal, immutable law, as regards the actions of man, and that the divine ordinances which regulate his conduct are the fruits of individual and collective development‡; that, in fact, the commands and the prohibitions, "the promises and the threats," which have been promulgated among, or held out to, mankind, have invariably

* Ibn-Khalikân.

† Compare the 1st Khutba of the Nahj-ul-Balâghat, the chapter on Free-will, in the Bahâr-ul-Anwâr and other Shiah traditions.

‡ Shahrastâni, p. 30.



been in consonance with the progress of humanity, and that the law has always grown with the growth of the human mind.* The doctrines of the *Ahl-ul-Itizâl* were adopted by Abdullâh-al-Mâmûn. He and his two immediate successors attempted to introduce the Mutazalite philosophy throughout the Moslem world. Unfortunately for Islâm, orthodoxy proved too powerful even for those sovereign pontiffs, and the triumph of Patristicism under the bigot Mutawakkil led eventually to the downfall of the Caliphate.

The Indian Shiahs are chiefly *Asnâ-Asharyas* or *Imâmîyas*. The Khojahs of Bombay are *Ismâilyas*, but they are numerically so few that they may as well be left out of consideration, especially as on legal questions they are in general accord with the *Asnâ-Asharyas*. These are divided into two sub-sections, the *Usûli* and the *Akhbâri*, namely, (1) those who adhere to certain principles of interpretation laid down by the *Mujtahids* (the jurists of their school), and (2) those who deny entirely the influence of authority on matters of opinion, unless such authority should be in harmony with the dictates of reason and judgment. The *Akhbâris* allow the exercise of *Kiyâs* (private judgment) on every legal question, and, as will be seen hereafter, are, in this respect, in accord with the principal Sunni school. They approach most closely the Mutazalas in the interpretation of the law, and in their acceptance of the doctrine of evolution.

As has already been shown, the Shiah school of law is historically anterior in date to that of the Sunnis. The founder

* Shahrastâni and Ibn-i-Khaldûn.



INTRODUCTION.

19

of the first distinctive Sunni school was Abû Hanîfa.* This great jurist was born in the year 80 of the Hijra (Hegira) during the reign of Abdul Malik ibn Merwân. He was educated in the Shiah school of law, and received his first instructions in jurisprudence from Imâm Jâfer-i-Sâdik (the sixth Imâm of the House of Mohammed), and heard traditions from Abû Abdullah ibn al Mubârak and Hâmed ibn Suleimân. Abû Hanîfa often quotes the great Shiah Imâm as his authority. On his return to his native city of Kûfa, though he continued to remain a zealous and consistent partisan of the House of Ali, he seceded from the Shiah school of law and founded a system of his own, diverging completely in many important points from the doctrines of the Shiah; and yet so close is the resemblance between his exposition of the law and their views, that there is no reason for doubt as to the source from which he derived his original inspiration. The latitude which he allows to private judgment in the interpretation of the law seems to be unquestionably a reflex of the opinions of the Fatimide doctors.

A proper comprehension of the teachings of Abû Hanîfa is of considerable assistance in illustrating and understanding the legal doctrines of the Shiah. The *Imâm-i-Azim* died in the year A.H. 150. The school which he founded goes by the name of *Hanafi*, and its tenets are in force among the major portion of the Indian Mussulmans, among the Afghans, Turkomans, almost all Central Asian Mahommedans, the Turks, and the Egyptians. His school owns by far the largest number of followers. Abû

* Abû Hanîfa-an-Nomân ibn Sâbit (A.C. 699-769).



Hanîfa's teachings were amplified by his disciples Abû Yusuff and Mohammed, who have, in the estimation of many Sunnis, almost overshadowed the fame of their great master. When the disciples differ from the Imâm, their opinions are generally adopted in preference to those of the master. It is a noteworthy circumstance that in various questions relating to dispositions of property, testamentary as well as *inter vivos*, Abû Yusuff's exposition is considered of greater authority than that of the other disciples, and even occasionally than that of Abû Hanîfa himself. In the same way, in questions regarding the law of inheritance, Mohammed's views have greater weight attached to them.

The founder of the second school of law among the Sunnis was (Abû Abdullah) Mâlik ibn Ans, whose tenets are in force in Northern Africa, especially in Morocco and Algeria. He died in the year A.H. 179 during the reign of Hârûn-ar-Rashîd.*

Shâfeî† was the founder of the third school. He was born at Ghizah in Syria, in the same year in which Abû Hanîfa died. He died in Egypt in the year A.H. 204 (A.C. 819) during the Caliphate of Al-Mâmûn. He was a contemporary of the Shiite Imâm Ali Musâ-ar-Rezâ. Shâfeî's doctrines are generally followed in Northern Africa, partially in Egypt, in Southern Arabia, and the Malayan peninsula, and among the Mussulmans of Ceylon. His followers are also to be found among the Borahs of the Bombay Presidency.

* His greatest legacy to his followers is known by the name of *Muwatta*, which treats of the oral dicta of the Prophet.

† Abû Abdullah Mohammed ibn Idrîs ash Shâfeî.



The fourth school was originated by Ibn-i-Hanbal.* It flourished during the reigns of Al Māmūn and his successor Mutassim Billāh. These two Caliphs were Mutazalas. Ibn Hanbal's extreme fanaticism, and the persistency with which he tried to inflame the bigotry of the masses against the sovereigns, brought him into trouble with the rulers. He died in the odour of great sanctity in the year A.H. 241. Ibn Hanbal and his patristicism are responsible for the ill-success of Māmūn in introducing the Mutazala doctrines throughout the empire, and for the frequent outbursts of persecution which deluged the Mahommedan world with the blood of Moslems.

Abū Hanīfa, Mālik, Shāfēi, and Ibn Hanbāl are the founders of the four orthodox schools among the Sunnis (the *Mazdhib-i-arbaḍ*). Their doctrines are essentially the same as regards the fundamental dogmas (*usūl*), though they differ from each other in the application of private judgment and in the interpretation and exposition of the Koran.

Shāfēi, Mālik, and Ibn Hanbal almost entirely exclude the exercise of private judgment in the exposition of legal principles. They are wholly governed by the force of precedents. They do not admit the validity of a recourse to analogical deductions, or of such an interpretation of the law whereby its spirit is adapted to the special circumstances of any particular case. Their followers are accordingly designated *Ahl-ul-hadīs* (traditionists *par excellence*).†

The exercise of private judgment, consecrated by the

* Abū Abdullah Ahmad ash Shaibāni al Marwāri ibn Hanbal (shortly Ahmad ibn Hanbal).

† Shahrastāni; Ibn Khaldūn.



Prophet and adhered to strictly by his immediate descendants, had induced the development of a liberal spirit among the Fatimides; and this had its legitimate influence on the mind of Abû Hanîfa. The value which he and his disciples attach to the exercise of Kiyâs is proved by a series of passages given in the *Fatâwa-i-Alamgîri*.* The followers of Abû Hanîfa are styled *Ahl-ur-Rai wal Kiyâs* (people of judgment and reason).

II.

THE reforms instituted by Mohammed effected a vast and marked improvement in the position of women. Both among the Arabs and the Jews who inhabited the peninsula of Arabia the condition of women was extremely degraded. The Hebrew maiden, even in her father's house, stood in the position of a servant†; her father could sell her if a minor. He, and after his death his son, disposed of her at their will and pleasure. The daughter inherited nothing except in the extremest case.‡ Among the pagan Arabs a woman was considered a mere chattel; she formed an integral part of the estate of her husband or her father; and the widows of a man descended to his son or sons by right of inheritance, as any other portion

* In p. 383 of the third volume occurs a passage taken from the *Muhtâ*, which is worth quoting. It says, "If the concurrent opinion of the Apostolic Companions should not be forthcoming, but there should be a concordance among their contemporaries, the Kazi should follow the principles observed by the latter; should there be, however, a difference among the *Tâbiîn* (contemporaries), the judge should compare their arguments and adopt the judgment he deems preferable." Other passages of the like import are contained in the same volume, which place the doctrines of the Hanîfite school in the clearest light possible.

† Numbers xxx. 17.

‡ Dollinger, "The Gentile and the Jew," vol. ii. p. 341.



of his patrimony. Hence the frequent unions between stepsons and mothers-in-law, which, when subsequently forbidden by Islâm, were branded under the name of *Nikâh-al-Mukt* ("shameful or odious marriages").

The Pre-Islâmite Arabs carried their aversion to women so far as to destroy, by burying alive many of their female children. This fearful custom, which was most prevalent among the tribes of Koreish and Kendah, was denounced in burning terms by Mohammed, and was prohibited under severe penalties, along with the inhuman practice which they, in common with other nations of antiquity, observed of sacrificing children to their gods.*

Under the Islâmîc laws, as will be shown in detail hereafter, a woman occupies a superior legal position to that of her English sister. As long as she is unmarried, she remains under the parental roof and until she attains her majority she is, to some extent, under the control of the father or his representative. As soon, however, as she is of age, the law vests in her all the rights which belong to her as an independent human being. She is entitled to share in the inheritance of her parents along with her brothers, and though the proportion is different, the distinction is founded on a just comprehension of the relative circumstances of brother and sister. On her marriage she does not lose her individuality. She does not cease to be a separate member of society, and her existence does not "merge" in that of her husband. No doctrine of "coverture" is recognised; and her property

* See Koran, chaps. vi., xvi., xvii., and lxxxi.



remains hers in her individual right. She can sue her debtors in the open courts, without the necessity of joining a next friend or under cover of her husband's name. She continues to exercise, after she has passed from her father's house into her husband's home, all the rights which the law gives to men. All the privileges which belong to her as a woman and a wife are secured to her not by the courtesies that "come and go," but by the actual text in the book of law. She can alienate or devise her property without asking the leave of her husband. She can act as an administratrix or executrix, or be appointed a *Mutwallièh* (governor of a charitable endowment).

A Moslem marriage is a civil act, needing no mollah, requiring no sacred rite. The contract of marriage gives the man no power over the woman's person beyond what the law defines, and none whatever upon her goods and property. A Mussulman wife retains in her husband's household all the rights which the law vests in her as a responsible member of society. She can be sued as a *femme sole*. She can receive property without the intervention of trustees. She has a distinct lien upon her husband's estate for her antenuptial settlement. Her rights as a mother do not depend for their recognition upon the idiosyncracies of individual judges. She can enter into binding contracts with her husband, and proceed against him in law if necessary. Her earnings acquired by her individual exertions cannot be wasted by a prodigal husband, nor can she be ill-treated with impunity by one who is brutal.

"Of course," as says a recent writer, "there may be secret



INTRODUCTION.

25

tyrannies in Asia, as there may be in America . . . but the excesses of a Moslem husband find no sanction either in the silence or in the provisions of the actual code. If he does wrong, he does it as wrong, and with the fear of punishment in his heart. When a man commits an abuse of the harem, however trifling, he knows that for the victim of his temper there is a swift and sure appeal to an impartial judge.”* “Our common law,” says the same writer, “gives up the wife so thoroughly into her husband’s power, that a woman who comes to the altar young, confiding, beautiful, and rich, may be compelled by brutal treatment, for which the law gives her no redress, to quit it, after a dozen years, an outraged woman with a ruined fortune and a wasted frame.” The whole history of Mahommedan legislation is a standing rebuke to those who consider that the position of women under the Islâmic laws is one of exceptional severity and degradation.

“Among all Eastern nations of antiquity polygamy was a recognised institution. Its practice by royalty, which everywhere bore the insignia of divinity, sanctified its observance to the people.”† Among the Hindoos, polygamy in both its aspects, prevailed from the earliest times. There was, apparently, as among the ancient Medes, Babylonians, Assyrians, and Persians, no restriction as to the number of wives a man might have. A high-caste Brahmin even in modern times is privileged to marry as many wives as he chooses. Polygamy existed among the Israelites before the time of Moses, who continued

* Hepworth Dixon’s “New America.”

† “Life of Mohammed,” p. 219.





the institution without imposing any limit on the number of marriages which a Hebrew husband might contract. In later times the Talmud of Jerusalem restricted the number by the ability of the husband to maintain the wives properly*; and though the Rabbins counselled that a man should not take more than four wives, the Karaites differed from them and did not recognise the validity of any limitation.

Among the Athenians, the most civilised and most cultured of all the nations of antiquity, the wife was a mere chattel, marketable and transferable to others, and a subject of testamentary disposition. She was regarded in the light of an evil, indispensable for the ordering of the household and procreation of children. An Athenian was allowed to have any number of wives, and Demosthenes gloried in the possession by his people of three classes of women, two of which furnished the legal and semi-legal wives.†

Among the Romans, also, polygamy flourished in a more or less pronounced form until forbidden by the laws of Justinian.‡ But the prohibition contained in the civil law effected no change in the moral ideas of the people, and polygamy continued to be practised until condemned by the opinion of modern society. The wives, with the exception of the one first married, laboured under severe disabilities. Without rights, without any of the safeguards which law threw around the favoured first one, they were the slaves of every caprice and whim of their husbands. Their children were stigmatised

* Eben Haezer, "Code Rabbinique," vol. i. p. 45.

† Dollinger, "The Gentile and the Jew," vol. ii. pp. 233-238. Comp. also *Encyclopedie Universelle*, "Art. Mariage.

‡ Gibbon, "Decline and Fall of the Roman Empire," vol. iv. p. 206.



as bastards, precluded from all share in the inheritance of their father, and treated as outcasts from society.

Morganatic and left-handed marriages were not confined to the aristocracy. Even the clergy, frequently forgetting their vows of celibacy, contracted more than one legal or illegal union. History proves conclusively that until very recent times polygamy was not considered so reprehensible as it is now. St. Augustine himself seems to have observed in it no intrinsic immorality or sinfulness, and declared that polygamy was not a crime where it was the legal institution of a country. The German reformers, as Hallam points out, even so late as the sixteenth century admitted the validity of a second or a third marriage contemporaneously with the first, in default of issue and other similar causes.

Among the ancient Arabs and the Jews, there existed, besides the system of plurality of wives, the custom of entering into conditional as well as temporary contracts of marriage. These loose notions of morality exercised the most disastrous influence on the constitution of society within the Peninsula. Beyond the boundaries of Arabia the condition of morals was no less lax. In the Persian and the Byzantine empires women occupied the most degraded position in the social scale. Fanatical enthusiasts, whom Christendom in later times canonised as saints, preached against them and denounced their enormities, forgetting that the evils they perceived in women were the reflections of their own jaundiced minds. It was at this time, when the social fabric was falling to pieces on all sides, when all that had hitherto kept it together was giving way, when the cry had gone forth that all



the older systems had been weighed in the scale of experience and found wanting, that Mohammed introduced his reforms.

Mohammed enforced as one of the essential teachings of his creed, "Respect for women." And his followers, in their admiration of the virtues of his celebrated daughter, proclaimed her "the Lady of Paradise,"* as the representative of her sex. In the laws which the Arabian Prophet promulgated he strictly prohibited the custom of conditional marriages, and though at first temporary marriages were tacitly allowed, in the third year of the Hijra even these were forbidden. Mohammed secured to women, in his system, rights which they had not before possessed: he allowed them privileges the value of which will be more fully appreciated as time advances. He placed them on a footing of perfect equality with men in the exercise of all legal powers and functions.† He restrained polygamy by limiting the maximum number of contemporaneous marriages and by making absolute equity towards all, obligatory on the man. It is worthy of note that the clause in the Koran‡ which contains the permission to contract four contemporaneous marriages, is immediately followed by a sentence which cuts down the significance of the preceding passage to its normal and legitimate dimensions. The former passage says, "You *may* marry two, three, or four wives, but not more." The subsequent lines declare, "but if you cannot deal equitably and justly with all, you *shall* marry only one." The extreme im-

* *Khâtûn-i-jinnat*.

† The ancient Arabs did not allow women, and it is also said infant children—in fact, those who could not take part in the tribal wars—to share in the inheritance of their husbands and parents.

‡ Koran, chap. iv., v. 3.



portance of this proviso, bearing especially in mind the meaning which is attached to the word "equity" (*adl*) in the Koranic teachings, has not been lost sight of by the great thinkers of the Moslem world. Even so early as the third century of the era of the Hijra, during the reign of Al-Mâmûn, the first Motalite doctors taught that the developed Koranic laws inculcated monogamy. And though the cruel persecutions of the mad bigot, Mutawwakil, prevented the general diffusion of their teachings, the conviction is gradually forcing itself on all sides, in all advanced Moslem communities, that polygamy is as much opposed to the Islâmic laws as it is to the general progress of civilised society and true culture. In India especially this idea is becoming a strong moral, if not a religious conviction, and many extraneous circumstances in combination with this growing feeling are tending to root out the existence of polygamy from among the Mussulmans. A custom has grown up in that country, which is largely followed by all classes of the community, of drawing up a marriage deed containing a formal renunciation on the part of the future husband of any right or semblance of right which he might possess or claim to possess to contract a second marriage during the existence of the first. This custom serves as a most efficacious check upon the growth and the perpetuation of the institution of polygamy. In India more than ninety-five per cent. of Mahomedans are at the present moment, either by conviction or necessity, monogamists. Among the educated classes, versed in the history of their ancestors and able to compare it with the records of other nations, the custom is regarded with disapprobation amounting almost to disgust. In Persia, according



to Colonel Macgregor's statement, only two per cent. of the population enjoy the questionable luxury of plurality of wives. It is earnestly to be hoped that before long a general synod of Moslem doctors will authoritatively declare that polygamy, like slavery, is abhorrent to the laws of Islâm.

It cannot be denied that several institutions which the Mussulmans borrowed from the pre-Islâmic period, "the days of Ignorance," and which exist simply as so many survivals of an older growth, have had the tendency of retarding the advancement of Mahommedan nations. Among them the system of the seclusion of females is one. It had been in practice among most of the nations of antiquity from the earliest times. Even the Athenians seem to have observed the custom in all its strictness. The system possesses many advantages in the social well-being of unsettled and uncultured communities. Mohammed found it existing among his contemporaries; he perceived the advantages, and he accordingly recommended its observance to his followers. Whether he intended it to acquire the character of a moral law or to attain its present inelastic form, is a question which it is impossible to answer directly. And yet it is a mistake to suppose there is anything in the law which tends to the perpetuation of the custom. Considerable light is thrown on the Lawgiver's recommendation for female privacy, by the remarkable immunity from restraint or seclusion which the members of his family always enjoyed.* The de-

* Âyesha, the daughter of Abû Bakr, who was married to Mohammed on Khadija's death, personally conducted the insurrectionary movement against Ali. She commanded her own troops at the famous "Battle of the Camel." Fâtima, the daughter of the Prophet, often took part in the discussions regarding the succession to the Caliphate. The grand-daughter of Mohammed,



pravity of morals which had sapped the foundations of society among the pre-Islamite Arabs as well as among the Jews and the Christians, urgently needed some correction. The Prophet's counsel regarding the privacy of women served undoubtedly to stem the tide of immorality and to prevent the diffusion among his followers of the custom of disguised polyandry which had evidently, until then, existed among the pagan Arabs.

The *Harem*, according to Von Hammer,* is the sanctuary of conjugal happiness. It is prohibited to strangers, not because women are considered unworthy of confidence, but on account of the sacredness with which custom and manners invest them. "The degree of reverence which is accorded to women throughout Higher Asia and Europe (among Mahommedan communities) is a matter capable of the clearest demonstration. In order, however, to regulate the intimate relationship of the husband and wife, they have instituted the custom of seclusion, which cannot be invaded even by him. The Arabic word *harem*, erroneously construed by Europeans to mean 'the imprisonment of women,' signifies 'the women's apartment'; and the Odalisques among the Turks resemble the *demoiselle de compagnie* among the Germans." Within the sacred precincts of the *zenana* or *anderoon* (as it is called in Persia†) the wife reigns supreme. The husband has no authority within that circle, and frequently he cannot enter it without her permission. We shall point out in detail later on, the safeguards by which

Zainab, the sister of Hussain, shielded her youthful nephew from the Omniades after the butchery of Kербela. Her indomitable spirit awed equally the ferocious Obaidullah ibn Ziyād and the pitiless Yezid.

* "Hist. de l'Empire Ottoman," vol. iii. p. 213.

† The *Haramlik* in Turkey.



the wife is surrounded by the law. Here we shall do no more than simply call attention to her present social position. Taken as a whole, her condition is not more unfavourable than that of many European women. Her comparatively backward condition is the result of want of culture among the community generally rather than of any especial feature in the Islâmic laws or institutions. Her legal status is decidedly superior to that of European women. The social immunities she enjoys allow the fullest exercise on her part of the powers and privileges which the law gives to her. She acts, if *sui juris*, in all matters which relate to herself and to her own property, in her own individual right without the intervention of husband or father. She appoints her own attorney, and delegates to him all the powers she herself possesses. She enters into valid contracts with her husband and her male relations on a footing of equality. If she is ill-treated she has a right to have the marriage tie dissolved. She is entitled to pledge the credit of her husband for the maintenance of herself and her children. She is able, even if holding a creed different to that of her husband, to claim the free and unfettered exercise of her own religious observances. If the husband is possessed of means, he is bound to place at his non-Moslem wife's disposal some conveyance to take her to her usual place of worship. He is debarred from molesting her in the smallest degree in the exercise of her faith; whilst, like a Moslem mother, she is entitled to the custody of her children. Her antenuptial settlement is her own by absolute right, and she can deal with it according to her own will and pleasure. To become entitled to its enjoyment she requires no intermediaries, trustees,



or next friends. When she is aggrieved by her husband, she has a right to sue him in her individual capacity. Her claim for her antenuptial settlement in the estate of her husband has priority over all unsecured debts, and she ranks in *pari passu* with secured creditors.

Whilst the girl is a minor, the father has the right of entering into a contract of marriage for her, as in the case of his male child; but this power, as will be subsequently shown, is restrained by the right of objection possessed by the guardian next in order to the father, in case of fraud or a likelihood of prejudice to the interests of the child. If a minor be contracted in marriage by any guardian other than the father, he or she has an absolute and unqualified option either to ratify or dissolve the contract on attaining majority. A woman who is *sui juris* can under no circumstance be married without her own express consent. No marriage is valid without an antenuptial settlement by the husband in favour of the wife; in fact, an antenuptial settlement is a condition precedent to the validity of a marriage, whether the wife be a Moslem or a non-Moslem. Among the Romans the wife was required to bring a dowry, and the custom has been adopted by many Western nations in a modified form. Among the Mussulmans in India it exists in the shape of *Jahéz*, articles of value or utility, ornaments or household utensils, which the bride's parents send with her, but which remain exclusively as her *peculium*. Sometimes the *Jahéz* or (*Jaház*) consists of money or securities.

In India, ante-nuptial settlements are very large, often far beyond the means of the individual to liquidate, the object

being to prevent the possibility of a divorce on the part of the husband. As the Mahommedan law regards marriage in the light of a civil contract, it gives to the married parties, under certain circumstances, the right of dissolving the contract. In those cases where the divorce proceeds from the husband, or from some line of conduct on his part, he has to pay down the entire sum settled on the wife, before he can legally dissolve the marriage.

Ill-treatment of the wife is strictly prohibited, and where she is habitually ill-treated, she has the right of obtaining a divorce. So, likewise, in the case of desertion or non-maintenance. In case of discord and disagreement arising between the married parties, the *Hâkim-i-Shara* either appoints some respectable females, or proceeds himself, to effect a reconciliation. When the disagreement, arising from incompatibility of temper or any other cause, continues, and all efforts to bring about a compromise prove unavailing, then only may the parties proceed to dissolve the contract by *talâk* or *khulâ* or *mubârât*. When the cause of disagreement arises from the conduct of the husband, when he is the principal offender, or when he alone wishes for a divorce, he is bound to liquidate the unpaid portion of the settlement-debt, and as in India these sums are so large as to be absolutely prohibitory, the power of obtaining a divorce *suo motu* possessed by a husband is virtually *nil*. When the discord originates with the wife, or when she herself is anxious to obtain a divorce without any justifiable cause, she has simply to abandon her claim to the settlement in order to secure a dissolution of her marriage. The wife thus occupies a decidedly more advantageous position than the husband.



The limitations imposed on the right of divorce will be treated of in detail in the text. It will, however, not be out of place here to mention that the Mutazalas differ from the principal schools with regard to the conditions under which a valid divorce may be effected. The essential point of difference consists in the fact that, according to this school, the order of a judge is in every case necessary to constitute a legal separation. A divorce, therefore, proceeding either from the husband or the wife, is held to be invalid until confirmed by or effected in the presence of the *Hākim-i-Shara*, with his sanction and approval; for, according to the Mutazalas, it is contrary to all the principles of public policy to allow man or woman to dissolve the marriage-tie at their own free will and desire.

The Mutazalas, besides, differ from the other schools in insisting that a repudiation or *talāk* initiated by the husband should be founded on some justifiable cause, and should not proceed simply from caprice; and that the *Hākim-i-Shara* should declare, on the failure of all attempts to reconcile the parties, the cause to be reasonable and proper. These limitations largely curtail the powers which the law, as construed by some of the principal schools, reserves to the husband as well as the wife to dissolve the contract on the occurrence of any contingency that makes the marriage tie irksome.

Divorce is never resorted to among the upper classes of Mussulmans in India, and even in the lower strata of society, it is so rare as to be inappreciable in its influence on public morality. Two causes, presumably, have led to this result. Among the higher ranks, considerations of family honour act as the deterrent motive; whilst the poorer



and more ignorant portions of the community are restrained by the pecuniary penalty which is attached to divorce. In other Moslem countries, where the sentiment of family honour is not so strong, and the pecuniary penalty not so heavy as in India, the restraining influence is due to another provision in the law, which is recognised by the Sunnis and the Shiahhs, but discarded by the Mutazalas. According to the Rabbinical code, the husband who once divorced his wife could under no possible circumstance remarry her. The Sunnis, as well as the Shiahhs, allow a remarriage, subject to the condition that the divorcée should go through the marital ceremony with another husband and be divorced from him. This peculiar condition, though not recognised by the Mutazalas, has the effect of preventing the promiscuous and unrestrained practice of divorce among uncultured races, by appealing to the instinct of jealousy—probably the only feeling which influences semi-civilised communities.

II.

SLAVERY in some of its features has been aptly compared to polygamy. Like polygamy, it has existed among all nations, and has died away with the progress of human thought and the growth of a sense of justice among mankind. The practice of slavery is coeval with human existence. Historically, its traces are visible in every age and among every nation of which we have any positive information. Its germs were developed in the savage state of society, and slavery continued to flourish even when the advancement of ideas and the growth of ma-



terial civilisation had done away with its apparent necessity. The Jews, the Greeks, the Romans, and the ancient Germans—people whose legal and social institutions have most affected modern ideas and modern manners and customs—recognised and practised both kinds of slavery, prædial servitude as well as household slavery. Among the Hebrews the lot of non-Israelite bondsmen and bondswomen was one of unmitigated hardship. “Helots of the soil, or slaves of the house, hated and despised at the same time, they lived a life of perpetual drudgery in the service of pitiless masters.”

The later Roman law took from the masters the power of inflicting capital and other severe punishments on their slaves, which the archaic rules of the Twelve Tables had conferred on them. The Digest, however, compiled under a Christian emperor, pronounced slavery a constitution of the law of nature, and the Code fixed the maximum price of slaves according to the professions for which they were intended. Among the pre-Islamic Arabs, all captives of war were either reduced to slavery or put to the sword. The Koranic legislation abolished the custom of massacring prisoners of war, and allowed them to be retained in bondage until ransomed. It recognised, in fact, only one kind of slavery, the servitude of men made captives in *bonâ fide* lawful warfare, *Jehâd-i-Sharâi*. The Koran always speaks of slaves as “those whosoever your right hands have acquired.”

Mohammed, according to a tradition from Imâm Jâfer-i-Sâdik declared the man who dealt in slaves as the outcast of humanity. Slave-lifting and slave-dealing he utterly reprobated and condemned. The enfranchisement of slaves was pro-



nounced to be the highest act of virtue. It was forbidden in absolute terms to reduce Moslems to slavery. The masters were forbidden to exact more work than was just and proper. They were enjoined to clothe their bondsmen and bondswomen, taken in legal warfare, to feed and lodge them as friends and guests, without any regard to their position. Above all, it was ordered that "in no case should the mother be separated from her child," "nor brother from brother," "nor father from son," "nor husband from wife," "nor one relative from another." The possession of a slave by the Koranic laws was conditional on a *bond fide* war, waged in self-defence, against idolatrous enemies; and it was permitted to serve as a guarantee for the preservation of the lives of the captives. Among uncivilised races, with whom the struggle for existence is accentuated by the scantiness of food, prisoners of war are spared with the object of profiting by their labours. Mohammed found the custom existing among the pagan Arabs; he minimised the evil, and at the same time laid down such strict rules that, but for the perversity of his followers, slavery as a social institution would have ceased to exist with the discontinuance of the wars in which the Moslem community was at first involved.

The mutilation of the human body was also explicitly forbidden by Mohammed, and the institution which flourished both in the Persian and the Byzantine empires was denounced in severe terms. Slavery by purchase was unknown during the reigns of the first four Caliphs, the *Khulafâi-râshadîn*, "the legitimate Caliphs" as they are called by the Sunnis. There is, at least, no authentic record of any slave having been



acquired by purchase during their tenure of the office. But with the accession of the usurping House of Ommiah, a change came over the spirit of Islām. Moâwiyah was the first Mussulman sovereign who introduced into the Mahommedan world the practice of acquiring slaves by purchase. He was also the first to adopt the Byzantine custom of guarding his women by eunuchs. During the reigns of the early Abbassides the Shiah Imâm Jâfer-i-Sâdik preached against slavery. And his views were adopted by the Mutazalas and the Bâtinyas. Karmath, who flourished in the ninth century of the Christian era,* and whose name, justly or unjustly, has become infamous among the so-called orthodox section of the Moslems, was a Bâtinya, who held that the religion of Mohammed, like the ancient faiths, had two significations, one esoteric, the other exoteric.† Karmath's violent denunciations against domestic slavery constituted the chief reason for his being placed under the ban by a great majority of Mussulmans.

An introduction to a treatise on the Personal Law of the Mahommedans will not be complete unless attention is briefly drawn to the disqualifications which exclude individuals from the enjoyment of certain civil rights. These disqualifications are primarily political in their nature.

Difference of religion, or what would be called in Mussulman legal treatises, infidelity, implied in early times unqualified hostility to the commonwealth of Islām, and apostasy was tantamount to treason. Accordingly, the Sunnis and the Shiahs agree in excluding the non-Moslem, as well as the per-

* A.C. 890, A.H. 277.

† "Shahrestâni," p. 147 (Cureton's Edition).



son who has abjured the Mussulman faith, from the right of succession to the inheritance of Mussulman relations, on the ground that by so doing they keep out hostile and treasonable elements from the Mahommedan body politic.

The Indian Act XXI. of 1850 has removed the impediment to succession which the Mussulman law imposed on the persons who abjured Islâm. But it leaves untouched the disqualification which the Mahommedans attach to original infidelity.

Difference of temporal allegiance, when the states are not in amity with each other, also forms a disqualification according to the Sunnis, though the Shiahs seem to differ on this point. Slavery and homicide also constitute causes which exclude a person from the exercise of civil rights.



CHAPTER I.

THE LAW RELATING TO THE SUCCESSION TO PROPERTY
AMONG THE SUNNIS AND THE SHIAHS.

BEFORE proceeding to trace the principal points of difference between the Sunni and the Shiah schools of law on the subject of devolution of property, it is necessary to notice the principles on which they are in accord.

It may be remarked that, as a general rule, the law of succession, both among the Shiahs and the Sunnis, proceeds on the assumption of intestacy. During his lifetime, a Mussulman has absolute power over his property, whether it is ancestral or self-acquired, or whether it is real or personal. He may dispose of it in whatever way he likes. But such dispositions in order to be valid and effective are required to have operation given to them during the lifetime of the



owner. If a gift be made, the subject matter of the gift must be made over to the donee during the lifetime of the donor; he must, in fact, divest himself of all proprietary rights in it and place the donee in possession. To make the operation of the gift dependent upon the donor's death, would invalidate the donation. So also in the case of endowments for charitable or religious purposes. A disposition in favour of a charity, in order to be valid, should be accompanied by the complete divestment of all proprietary rights. As regards testamentary dispositions, the power is limited to one-third of the property, provided it is not in favour of one who is entitled to share in the inheritance. For example, the proprietor may devise by will one-third of his property to a stranger; should the devise, however, relate to more than one-third, or should it be in favour of an heir, it would be invalid.

This restriction on the testamentary powers of a Mussulman, which is not without analogy in some of the Western systems, leads to the consequence, that as far as the major portion of the estate and effects of a deceased propositus is concerned, the distribution takes place as if he had died intestate. Intestacy is accordingly the general rule among the Mussulmans; and as almost in every case there are more heirs than one entitled to share in the inheritance of the deceased, it is important to bear in mind the points of contact as well as of divergence between the Shiah and the Sunni schools.



As regards the points of contact, it may be stated generally that both the Sunnis and the Shiahhs are agreed on the principle by which the individuals who are entitled to an inheritance in the estate of the deceased can be distinguished from those who have no right. For example, a Mussulman, upon his death, may leave behind him a numerous body of relations. In the absence of certain determinate rules, it would be extremely difficult to distinguish between the *inheriting* and the *non-inheriting* relations. In order to obviate this difficulty and to render it easy to distinguish between the two classes of heirs, it is recognised by both the schools, as a general rule and one capable of universal application, that when a deceased Mussulman leaves behind him two relations, one of whom is connected with him through the other, the former shall not succeed whilst the intermediate person is alive. For example, if a person on his death leave behind him a son and that son's son, this latter will not succeed to his grandfather's estate while his father is alive. The other rule, which is also framed with the object of discovering the heirs of a deceased individual, is adopted with some modification by the two schools. For example, in the succession of male agnates, the Sunnis prefer the *nearer in degree* to the more remote, whilst the Shiahhs apply the rule of nearness or propinquity to all cases without distinction of class or sex. If a person die leaving behind him a brother's son and a brother's grandson, and his own daughter's son, among the Sunnis, the



brother's son being a male agnate and nearer to the deceased than the brother's grandson, takes the inheritance in preference to the others; whilst among the Shiahhs, the daughter's son, being nearer in blood, would exclude the others.

It will be seen, therefore, that the right of succession of the different relations who may survive a deceased person, varies according to circumstances. Some of them are absolutely excluded by the operation of the principles referred to, whilst others have their shares reduced by the fact of their coexisting with certain relations who may or may not participate in the inheritance. But both among the Sunnis and the Shiahhs there is one class of heirs who are never excluded from succession, however much their respective shares may vary. This class of heirs comprises the father, the mother, the daughter, the husband or wife.

Neither the Sunnis nor the Shiahhs recognise the principle of representation, and though the Ismailiyas, and apparently the Mutazalas, hold a different view, there is no definite expression anywhere of their doctrines. For example, if A. had two sons one of whom died during his lifetime leaving several children, these children do not possess the right of representing their father on the decease of A., but are "excluded" from the inheritance by their uncle.

So far, the two principal schools are in accord with each other. They differ, however, essentially in their system of classification.

The Sunnis recognise three classes of heirs :—

- (1.) The *Zav-il-furûz* (the “ sharers,” persons whose shares are specified in the Koran).
- (2.) The *Asabâh** (the “ agnates”).
- (3.) The *Zav-il-arhâm* (“ uterine relations” †).

With reference to the *Zav-il-furûz* (the “ sharers ”), there is no difference among the Shiahhs and the Sunnis. But the former repudiate entirely an arbitrary classification of heirs into agnates and uterine relations. Accordingly, they do not recognise the distinction of *Asabâh* and *Zav-il-arhâm* ; they group all the heirs together and treat them with respect to their degree of propinquity to the deceased, as will be shown hereafter. Among the Sunnis, however, the uterine relations are placed in the last category ; and it is only in the absence of sharers and agnates that they receive any share in the inheritance. The sharers take their specified portions, and the residue is then divided among the agnates. If there should be no agnates, the residue reverts or “ returns ” to the sharers. If neither sharers nor agnates should exist, then the estate is divided among the uterine relations.

The “ sharers,” or *Zav-il-furûz*, are twelve in number. Their shares are liable to variation, according to circumstances, and some of them are subject also to entire exclusion, owing to the operation of the two

* Called by English writers “ Residuaries.”

† Called by English writers “ the Distant Kindred.”

principles of elimination specified above. Four of these sharers are males and eight females. The four males are (1) the father, (2) the grandfather or lineal male ascendant (when not excluded), (3) the uterine brother, and (4) the husband.

The Mahommedan lawyers attribute to the father three characters—(1) the character of a simple sharer when the deceased happens to have a lineal male descendant; (2) the character of a simple residuary when he co-exists with a person who is only a sharer—as a husband, a mother or a grandmother—when he takes the residue of the estate after the allotment of the share or shares; and (3) the character of both a sharer and a residuary, as when he co-exists with a daughter or daughters. In this case he takes first his share and then becomes entitled to any residue after allotment of the daughter or daughters' shares. For the sake of simplicity in the latter two cases, he may be said to take simply as a residuary.

1. A father's share with son or son's son or lineal male descendants, like son's sons or son's son's son, is $\frac{1}{6}$.

2. True grandfather or lineal male ascendant (who is not excluded), $\frac{1}{6}$.

3. Uterine brother (when only one, and no child, son's child, father, or *true** grandfather), $\frac{1}{6}$.

* The term *true* (among the Sunnis) is applied to those ascendants in whose line of relationship to the deceased no female enters; for example, a father's father is a *true* grandfather, whilst a mother's father is not.

When two or more and no child or son's child, father, or *true* grandfather, $\frac{1}{3}$.

4. Husband (when there is a child or son's child, how low soever), $\frac{1}{4}$.

Without them, $\frac{1}{2}$.

5. Wife (without child or son's child, how low soever), $\frac{1}{4}$.

With child, $\frac{1}{3}$.

6. Daughter (when only one and no son, so as to render her a residuary), $\frac{1}{2}$.

Two or more (and no son), $\frac{2}{3}$.

7. Son's daughter (or son's son's daughter, how low soever)—

when only one and no child or son's son, $\frac{1}{2}$.

when two or more and no child or son's son, $\frac{2}{3}$.

when one daughter and no son or son's son, $(\frac{2}{3} - \frac{1}{2}) = \frac{1}{6}$.

8. Mother (when with child or son's child how low soever, or two or more brothers and sisters, whether consanguine or uterine), $\frac{1}{3}$.

When not, $\frac{1}{3}$.

But $\frac{1}{3}$ of *remainder* after deducting husband's or wife's share, when with *father*; $\frac{1}{3}$ of *whole* when with *grandfather*.

9. *True* grandmother, how low soever (when not excluded), $\frac{1}{6}$.

10. Sister (when only one and no son, son's son how low soever, father, *true* grandfather, daughter, son's daughter, or brother), $\frac{1}{4}$.

When two or more and no such excluder, $\frac{2}{3}$.

11. Consanguine sister (when only one and no excluder as above or full sister), $\frac{1}{2}$.

When two or more and no such excluder, $\frac{2}{3}$.

12. Uterine sister takes like *uterine brother*.

These represent the sharers; persons whose shares are specified in the Koran, and with reference to whom, therefore, there is little or no difference between the Sunnis and the Shiah's. The synoptical tables at the end of the chapter will give a more general idea of the points on which the two schools differ regarding this branch of the subject. We propose here to give a sketch of the Hanafî system of classification, and distinguish it afterwards from the one adopted by the Shiah's.*

As stated before, all the Sunni schools recognise three classes of heirs, viz. *sharers*, *residuaries*, and *uterine relations*. The sharers have been already mentioned.

Residuaries.—The residuaries are divided into three classes—(1) residuaries in their own right; (2) residuaries in another's right; and (3) residuaries together with another.

The first class includes all those male relations in whose line of relationship to the deceased no female enters;—(for if a female were to come in, the male is no longer a residuary, e.g. a mother's son is not a residuary but a sharer.†) These are the *Asabâh proprio jure* (*Asabâh-be-nafsihi*).

* For the Mâlikî doctrines, see note viii.

† "Durr-ul-Mukhtâr," p. 864.



Residuaries in their own right are divided into four sub-classes :—

- (1.) The offspring of the deceased ;
- (2.) His root, *i.e.* the ascendants ;
- (3.) The offspring of his father, viz. the brothers and their descendants ;
- (4.) The offspring of his grandfather *how high soever*.

It must be remarked that in the succession of the *Asabâh* proper, when the relations are of the same degree of affinity, preference is given to the strength of blood or consanguinity. For example, when the deceased leaves a full brother and a half brother by the same father only, though the degree of affinity is the same, yet the tie of blood being stronger in the case of a full brother than in that of the half-brother, preference is given to him. In the same way, a sister by the same father and mother (co-existing with a daughter) is preferred to a brother by the same father only ; and the son of a full brother is preferred to the son of a half-brother by the father's side. The "*Durr-ul-mukhtâr*," as a legitimate conclusion from the Prophet's doctrine, that "surely kinsmen by the same father and mother shall inherit before kinsmen by the same father only," lays down that where relations are of an equal degree of affinity, regard is to be paid to the strength of blood.

The residuaries in another's right are those females, who become residuaries only when they co-exist with

SUCCESSION TO PROPERTY.

certain males, that is, when there happen to be males of the same degree or who would take as such, though of a lower degree.*

These are four in number, viz. :—

- (1.) Daughters (with sons).
- (2.) Son's daughters (with a son's son or a male descendant still further removed in the direct line).
- (3.) The full sister (with her own or full brother).
- (4.) The sister by the same father, or, in other words, a consanguine sister (with her brother).

But it must be remembered that many males may become, in certain contingencies, residuaries, but it does not follow that in all cases their sisters would become residuaries *with* them. It is only when the female is a sharer herself that, instead of taking a share, she takes as a residuary when co-existing with a male residuary. For example, if a Mussulman dies leaving behind him a wife, a paternal uncle, and an aunt, "be the latter by the same father and mother, or by the same father only," the aunt, not being a *sharer* according to law, is not entitled to any share in the inheritance of her deceased nephew, and her brother (the uncle) takes the entire estate after allotment of the widow's share.

The residuaries together with others are those females

* "Durr-ul-Mukhtâr," pp. 864, 865.



who become residuaries when co-existing with other females* :—

(1.) Sisters, with daughters or son's daughters.

When a person dies leaving behind him several relations who may be classed as residuaries of the different kinds indicated, "preference is given to propinquity to the deceased, so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first."†

Thus when a man has died leaving a daughter, a full sister, and the son of a half-brother by the father—one-half of the inheritance is given to the daughter and the other half to the sister, who is a residuary *with* the daughter and nearer to the deceased than the brother's son.‡ So also when there is with the brother's son a paternal uncle, the uncle has no interest in the inheritance. Likewise, when in the place of the brother's son there is a half-brother by the father, there is nothing for the half-brother.§

Uterine Relations.—When there are no sharers or residuaries, the "uterine relations" succeed to the inheritance of the deceased according to the class to which they belong and to their respective claims.

Some writers have fallen into a mistake in supposing that the husband or the wives also exclude the

* "Sirâjijah," p. 19; "Durr-ul-Mukhtâr," p. 865.

† "Shama Churn Sircar's Lectures on Mahommedan Law," vol. i. p. 135.

‡ 6 Fatâwa Alamgîrî, p. 629.

§ See *ante* p. 49.

"uterine relations" from sharing in the patrimony of the deceased ancestor.* This is an erroneous idea. The *Zav-il-arhâm* are always entitled to a share when co-existing with the husband or wife.†

The *uterine relations* are divided into four classes, viz. :—

(1.) The children of daughters or of son's daughters.

(2.) *False* grandfathers and grandmothers.‡

(3.) The daughters of full-brothers and of half-brothers (by the same father only) and the children of half-brothers by the same mother only, and the children of sisters.

(4.) Father's half-brothers and sisters by the same mother only, and their children; the deceased's paternal aunts and their children; maternal uncles and aunts and their children; the daughters of full-paternal uncles and half-paternal uncles by the same father only.

The general order of succession is according to their classification, the first class succeeding first and so on.

Among the individuals of the various classes, succession is regulated by proximity to the deceased.

If the claimants be equal in sides as well as in degree, then the child of an heir is preferred; but if

* "Shama Churn Sircar's Lectures," vol. i. p. 139.

† "Durr-ul-Mukhtâr," p. 873.

‡ *False* in contradiction to *true*, see *ante*, p. 46.

the sides differ, the person related by the father's side is entitled to double the share given to the person related by the mother's side.*

Of the individuals of the first class of distant kindred—which comprises the children of daughters and the children of son's daughters—the nearest of them in degree to the deceased is the person preferably entitled to the succession.

Thus the daughter of a daughter will take in preference to the daughter of a son's daughter.†

If the claimants be equal in degree—that is, if all be related to the deceased in the second, third or fourth degree, as the case may be—then the child of an heir is preferred to the child of a distant relation, *e.g.* the child of a sharer or a residuary is preferred to the child of a uterine relation, *e.g.* son's daughter's daughter is preferred to daughter's daughter's son.

If the claimants be equal in sides as well as in degree, then the child of an heir, whether a sharer or a residuary, is preferred; but if the sides differ, the person related by the father's side is entitled to $\frac{2}{3}$, and the person related by the mother's side is entitled to $\frac{1}{3}$.‡

But if their degrees be equal and there be not among them the child of an heir, or if they all be related through an heir, then—according to Imâm

* "Durr-ul-Mukhtâr," p. 870.

† "6 Fatâwa-i-Alamgîrî," p. 637.

‡ "Durr-ul-Mukhtâr," p. 870.



Mohammed (whose opinion is followed in India by the Hanafî (Sunni) sect)—the shares would be regulated by the number and sex of the persons existing at the time the inheritance opens, provided the persons through whom the claimants are connected with the deceased are of the same sex, or, as it is technically said, “provided the sex of the *roots* agree.” (So far Abû Yusuf coincides with him.)

But if “the sex of the roots” differ, or, in other words, if the persons through whom the claimants happened to be connected with the deceased, differ in their sex, then, according to Imâm Mohammed, whose opinion on this point is followed by the Indian Sunnis, the shares are not regulated by the number and sex of the claimants but “by the roots.”

According to the rule of Abû Yusuf, which, being simpler and more intelligible, is followed throughout Western Asia, in every case where the claimants are of an equal degree, and there is not among them the child of an heir, the property is divided with reference to the sex and number of the claimants.*

Besides the heirs specified above, the Sunni law recognises the right of succession on account of the relationship of *valâ*.† Among the Hanafîs, *valâ* is of two descriptions, viz. *valâ-ul-atq*, “the right of

* “Sirâjîyah,” pp. 40, 131; Baillie’s “Muhammadan Law,” p. 706; “6 Fatawa,” p. 638. See Note I. at the end of the chapter.

† “*Valâ*,” says the Hedâya, “literally means friendship and assistance, but in the language of the law it signifies that assist-



inheritance acquired by emancipation," and the *valâ-ul-mawâlât*, "the right of inheritance by clientage." The Shiahhs recognise three kinds of *valâ*, two of which are analogous to those recognised by the Sunnis; but whilst the Shiahhs postpone the right of succession of the emancipator until after the blood-relations are all exhausted, the Sunnis give the preference to the emancipator over the uterine relations of the deceased. For example, if a man enfranchise his slave and that slave die subsequently, leaving certain heirs belonging to the class of uterine relations, the emancipator would exclude such relations, under the Sunni law. "By the *valâ* of manumission," says the Hedâya, "*asûbat* is established; in other words, when a person emancipates his slave, he is *asabâh* to such slave, and is entitled to inherit of him in preference to his maternal uncles or aunts or other uterine kindred." *

The emancipator is accordingly styled in Sunni law "a residuary for special cause." In the absence of the manumittor, his male, but not the female, residuary heirs succeed to the deceased freedman. Females

ance which is a cause of inheritance." It means, in fact, the peculiar and artificial relationship which, in a state of society like that of the Arabs, came into existence when the master freed his slave or when one person made himself the *client* of another, in both of which cases it was the duty of the parties to help each other; the master in one case and the patron in the other continuing liable for the *Diat* (blood-money, *wehr-geld*) of the freedman or client.

* 3 Hed., bk. xxiii.

succeed, however, when they themselves have manumitted the slave. If the deceased freedman leave no sharer or residuary by blood, his entire estate goes to the *Asabâh* by *valâ* (the emancipator or his male residuary heirs), to the absolute exclusion of the deceased's uterine relations. If he leave a sharer, then the specified share is allotted to such sharer, and the residue goes to the residuary by *valâ*; but if he leave a residuary by blood, then the latter takes nothing. Whilst the Shiah law restricts the right of inheritance by *valâ* exclusively to those cases where the emancipation has been granted voluntarily or as an act of charity, the Hanafî branch of the Sunnî law recognises no such restriction. For example, according to the "Sharîfyah," quoted by Baboo Shama Churn Sircar in his Lectures,* "The manumittor inherits from the manumitted in general, whether he manumitted for the sake of God or for the sake of Satan, or upon the condition of continuing under the manumittor's control, or upon the condition of not taking his *valâ*, or upon the condition of his giving or not giving some property, or as a *mukâtib*, or for other causes." So that whether the emancipation be for evil purposes or as an act of charity, whether it be sold to the emancipated or granted to him freely, the emancipator is always entitled to succeed to the inheritance of the emancipated, in case he dies without leaving residuaries by blood. Even if the right of

* Vol. i. p. 136.



valâ was expressly abandoned at the time when emancipation was granted, it would not interfere with the emancipator's right of succession. The Mâlikîs hold that in case of manumission for an evil purpose, or when the manumitter has renounced his claim by *valâ*, he has no title to succeed to the inheritance of the deceased freedman.

The emancipated slave is under no circumstance entitled to the inheritance of the emancipator.

But in the succession of the manumitter and his male residuaries to the emancipated slave, a variation is made by the Sunnis in the recognised order of succession. For example, in ordinary cases, when a man dies leaving behind him a son and a father, the father takes his specified share, viz. one-sixth, and the son takes the residue; but if a freedman were to die leaving behind no *Asabâh* by blood, but only his manumitter's son and father, the son of the emancipator would take the whole inheritance in exclusion of the father.* So also in the case of the manumitter's son co-existing with a grandfather. The general principle is that in the succession of "residuaries for special cause," the nearest takes the whole in preference to the one more remote (as an agnate).

Under the Sunni law, therefore, if a freedman leave a wife, a daughter's son, and his manumitter's son, the wife takes her specified share, and the residue goes to the emancipator's son (as "residuary for

* 3 Hed., bk. xxiii.

special cause") in total exclusion of the freedman's grandson. The right of persons by virtue, however, of the *valâ-i-mawâlât* (by clientage) is postponed until all other heirs are exhausted. The *mawla-ul-mawâlât* (the patron or the client, as the case may be), accordingly does not exclude the uterine relations, as happens in the case of the *valî-ul-atq*, coexisting with the *zav-il-arhâm*. The Shafeîs regard this form of *valâ* as implying a fraud on the *Bait-ul-mâl*, or public treasury, and consequently consider it illegal and invalid.

We have seen thus far the mode of classification and the principles of distribution in force among the Sunnis, and it must have become apparent that the rules of inheritance among them are highly complicated. Among the Shiah, on the contrary, the law of inheritance is of the greatest simplicity and does not involve any discussion regarding the relative rights of *agnates* and *cognates*—the *Asabâh* and *zav-il-Arhâm*. The great distinction, in fact, between the Shiah and the Sunni Law of Inheritance consists in the question of agnacy. The Shiah repudiate *in toto* the doctrine of *tâsib* (تأسيب), consequently the paternal relations of the male sex, or what are called *Asabâh* proper in Sunni jurisprudence, have no especial privilege, nor are they preferred to the relations connected with the deceased through females. The mode of classification adopted by the Sunnis is regarded by the Shiah as an outrage on the natural feelings of the human heart.

For example, the Shiah consider it as contrary to



justice to exclude the daughter's children in favour of the remote descendants of a brother, on the factitious ground of their being connected with the deceased through male relations.

According to the Shiahs, there are two causes which give rise to the right of inheritance, (1) *Nasab* (consanguinity), and (2) *Sabab* (special cause). Consanguinity implies simply the tie of blood. All relations, therefore, connected with the deceased by the tie of blood, are entitled to share in his inheritance unless excluded by the operation of the rules which we shall presently define.

The relations who are entitled to succession by virtue of consanguinity (*nasab*) are divided into three classes or groups, and each class again into two sections. The members belonging to the first class of heirs exclude from succession those belonging to the second, whilst these, in their turn, exclude the members belonging to the third class. But the heirs of the two sections of each class succeed together. For example :—

(a.) The first class of heirs entitled by *nasab* to inherit from the deceased consists (1) of the ascendants of the first degree, viz. the parents, and (2) of the children and their offspring, including all lineal descendants of the deceased.

(b.) The second class consists (1) of the ascendants of all degrees, and (2) brothers and sisters and their descendants.



(c.) The third class consists (1) of the paternal uncles and aunts, and (2) of the maternal uncles and aunts and their children.

Whilst there is a single member of the first class existing, those who belong to the second and third class are excluded absolutely from the succession. In the same way, if there be any relation of the second class, co-existing with relations of the third class, they take nothing. But the members of the two sections of each class succeed together. For example, parents take a share in the inheritance of the deceased with the children of the deceased; grandparents with the brothers and sisters; maternal uncles and aunts with the paternal uncles and aunts. A child or child's child, however, entirely excludes the brothers and sisters and their descendants. And so brothers and sisters and their descendants exclude the uncles and aunts, but they inherit together with the ascendants of the higher degree.

If a Sunni Mussulman die leaving behind him a daughter's daughter with a brother's son, the brother's son would, as an *Asabâh*, take the entire inheritance in exclusion of the deceased's own grandchild. Among the Shiah, the grand-daughter of the deceased, as a lineal descendant, takes the whole property to the exclusion of the brother's son.

If a Sunni Mussulman die leaving behind him a daughter and a brother, the daughter takes her specified share, viz. a moiety, and the rest goes to the brother, as a residuary or *Asabâh*. Under the Shiah

law, she takes the whole—half as her specified share, and the other half by the doctrine of return.

The right of succession for special cause (*sabab*) or “affinity,” is divided under two heads :—

- (1.) The right of inheritance by virtue of matrimony (*zoujiyat*); and
- (2.) The right of inheritance by virtue of *valâ* or special relationship.

The right of inheritance by virtue of *zoujiyat* appertains to the individual heir under all circumstances. The husband or the wife, accordingly, is never excluded from succession. If the deceased leave behind him a child and a widow, the latter takes her specified share, and the residue goes to the child. In the same way, a wife co-existing with the parents or grandparents or brothers and sisters of the deceased, is entitled to her specific share before the property is divided among the heirs, who succeed by virtue of *nasab*.

(2.) The right of inheritance by *valâ* (*al-mîras bil valâ* الميراث بالولا) has assumed a peculiar aspect among the Shiahs, owing to the political subjection in which they were kept in early times. This right is divided under three heads, viz. :—

- (1.) *Mîrâs-valî-ul-atq* (ميراث ولي العتق), “The right of inheritance possessed by the emancipator.”
- (2.) *Valâ-i-zâmin-uj-jarîrah* (ولاء ضامن الجريمة), “The right of inheritance for obligation of delicts committed by the deceased.”



- (3.) *Valâ-ul-Imâm* (ولا الامام), "The right of inheritance possessed by the *Imâm* by virtue of the *valâ* of *Imâmat* or spiritual headship."

The first form of *valâ* (*valâ-ul-atq*) has its exact counterpart in the Sunni law, but the right which springs from it is regarded in different ways by the two schools. For example, under the Sunni law, if a slave were to buy his liberty, it would not affect the right of inheritance possessed by the emancipator; and if the slave dies after enfranchisement, leaving no *Asabâh* proper of his own, the emancipator would take the whole inheritance to the exclusion of the emancipated slave's "uterine relations." Under the Shiah law, the emancipator succeeds to the inheritance of the freedman only under certain well-defined conditions, viz. (1) when the enfranchisement is purely spontaneous and voluntary on his part. When the slave's enfranchisement is obtained by payment of a ransom, or when he is manumitted in performance of a vow, or as a propitiative offering to the Deity, or when the emancipation is the result of law, then the emancipator has no right of succession. (2) The emancipator is entitled to succeed only when the freedman has left no blood relations behind him; and (3) when, after enfranchisement, the master continues responsible for the delicts of the emancipated. If the emancipator's responsibility cease by operation of the law or by virtue of a special contract, at the time of manumission, he would have no right of inheritance to the estate of the emancipated slave, nor would he have



any right if the deceased left any heirs connected to him by *nasab*.

The *valâ-i-zâmin-uj-jarîrah* is in some respects analogous to the *valâ-ul-mawâlât* of the Hanafîs, for the Shafeîs recognise no similar right. The history of the origin of the *valâ-i-zâmin-uj-jarîrah*, or, at least, the form it has taken among the Shiahs, throws considerable light on the state of manners and the conditions of society among the Mussulmans in early times.

In certain stages of society it has been usual for a stranger arriving in a foreign city to furnish guarantees for good behaviour. This custom appears to have existed in most of the free towns of Europe during the Middle Ages; and there can be little doubt that its counterpart in the East gave rise to the doctrine of *الضامن الجريرة* "The right of inheritance based on suretyship." The custom acquired a distinctive character under the Abbasside sovereigns, who invariably exacted security for good behaviour from all strangers who arrived in the city of Bagdad from Khorasan. Those who became sureties were responsible to the State for any offence committed by their clients, and were in return entitled to succeed to the inheritance of the latter when they died leaving no heir.* But this right was neither reciprocal nor transmissible.

* During the reign of Al-Mâmûn, the Imâm Ali Musâ-ar-Rezâ used to stand *zâmin* (surety) for all his people. He is therefore styled the Imâm Zâmin. The custom of tying a piece of gold on



In the absence of the *Vali-ul-atq* ("the emancipator") as well as the *Zâmin* ("the surety") the Imâm, as the Spiritual Head of the Shiahs, becomes entitled to the inheritance, there being no escheat under the Shiah law to the public treasury (*Bait-ul-mâl*). The right of the Imâm, however, is not in the nature of an escheat to the sovereign. The property goes to him as the Spiritual Head of the Shiah commonwealth, to be distributed among the poor and indigent of the locality where the intestate lived, or where he was born. In the absence (*ghibat*) of the Imâm, as is practically the case at the present moment, the twelfth Imâm having mysteriously disappeared near Kûfa, the property goes to his representative (the *Mujtahid*), the chief expounder of the law, to be distributed by him equitably and properly among the poor and indigent of the place where the intestate lived, or for such charitable and religious purposes as may seem consonant to his last wishes.

The right of the Imâm is, accordingly, not *quâ* sovereign, but *quâ* spiritual leader, and therefore it is subject to the ordinary bar of the statute of limitation. In India, the inheritance of a Shiah Mahomedan dying without leaving any possible heir of the various classes indicated above, goes to the *Mujtahid* of the locality nearest to the place where the intestate lived, as the representative of the Imâm ; but

the arms of all persons leaving home or making long journeys and commending them to the Imâm *Zâmin*, dates from this epoch.



supposing the right was neither claimed nor advanced for the space of twelve years from the date of the intestate's death, it would be barred by the ordinary limitation applicable to the claims of private individuals.

On this point, a dictum contained in the *Jâma-ush-shattât*, pronounced by a recent leading Mujtahid of Irân (Persia), is worth insertion.

“Q. What should be done with the property of a person dying without leaving any heir behind him (*mâl-i-mîn-lâ-wâris-lahû*) during the absence (*ghîbat*) of the Imâm; whether it is to be distributed among the poor of the locality where the deceased was born, or where he died, or where the property is situated; whether it is to be given generally to the poor, or applied to specific purposes; or whether it is to be preserved until the appearance of the Imâm; and in case it is required to be given to the poor, might it be given to one single individual whilst others are available, or must it be distributed among many; is the property to be given to the poor intact, or might it be sold and its proceeds distributed?

“A. The property of an intestate leaving no heir behind him does not go to the *Bait-ul-mâl*.

It is the property of the Imâm, whether he is present or absent (*ghâib*). If the deceased leave any heir behind him, even a *zâmin-i-jarîrat*, the Imâm does not succeed. If the Imâm be absent, the property should be distributed among the poor of the deceased's village or native city (*balad-i-myêt*). If it be considered

advisable by the *Mujtahid* to sell it, it is valid to do so, especially when the property in itself is of no use to the poor; when the poor are many, it is wrong to give it to one only, though there is nothing in law to make it invalid. The distribution in those cases ought to take place under the direction of the *hâkim* (judge), who is the delegate of the Imâm, and such is the opinion of the *Kifâyah*."

From the use of the word *hâkim* towards the end of the answer, it is clear that the *Mujtahid* acts in the capacity of a judge in the administration of the estate of the deceased intestate. In Shiah countries not subject to foreign control, the *Mujtahid*, who is the chief expounder of the law, is also frequently vested with the power of the *Kazî*. When this is the case, no difficulty occurs in the application of the principle of the Shiah law. But in India, where the Shiahs are subject to a non-Moslem power, the question may arise under whose direction the distribution contemplated by the Shiah law should take place. This question, it seems to us, is answered by the dictum quoted from the *Jâma-ash-shattât*. The Civil Court, representing the *hâkim* mentioned in the *Fatwa* would assume the charge of the property, and make it over to the *mujtahid* (if there be any) to be distributed among the poor and indigent of the deceased's village or native city, under the Court's own control and supervision, so as to leave no room for doubt as to its proper application. If there be no *mujtahid*, some Shiah officer should be appointed for the purpose of effecting the



distribution. It must also be remembered that the law does not *necessarily* contemplate the application of the proceeds in the shape of alms. If the object of the law, which has in view the benefit of the poor and the indigent, "who are always in need of help," can be attained by establishing an institution by which *regular* assistance can be rendered to them, it would be valid.

Under the Shiah law, heirs, to whichever class they may belong among the consanguineous relations, are divided into three categories in respect of the *right* which entitles them to participate in the inheritance of the deceased, viz. (1) Those whose heritable right is acquired by virtue of the shares assigned to them in the Koran (*el-farz*),* and who are therefore designated *zû-farz*; (2) Those who inherit sometimes as *zû-farz* and sometimes by virtue of their relationship (*karâbet*) to the deceased; and (3)† Those who take only by virtue of their relationship, and are, therefore, called the *zû-karâbet*, and are entitled to the *sahâm-bil-karâbet*.

The heirs who are entitled to appointed shares (the *zû-farz*) are—

(1.) A daughter or daughters, when without (the deceased's) father, and her own brother or brothers.

* For example, among those entitled by virtue of *nasab* (consanguinity), the mother is one who takes her appointed share and also the residue when there are no other heirs; the husband or wife belong to the same category, and take, except in rare cases, their shares as fixed in the Koran.

† For example, the father, the daughter or daughters, a full sister or sisters, and the uterine brothers and sisters.



(2.) Full sister or sisters, or a consanguine sister or sisters existing without a grandfather and brother or brothers of the same degree as themselves.

(3.) The father, with a child or children of the deceased.

(4.) The mother.

(5.) The husband, or the

(6.) Wife.

(7.) The person or persons related by the same mother only.

When there is only one heir, whether a *zû-farz* or a *zû-karâbet*, or one entitled by virtue of the special relationship of *sabab*, such heir takes the entire inheritance.

When the heir is a *zû-farz*, he or she takes first the appointed share, and the remainder is *returned* to such heir.

When the heir is a *zû-karâbet*, the entire inheritance goes to him by virtue of the relationship by blood; and so also when the relationship is one created by *sabab*.*

For example, an only daughter takes her appointed share, viz. one-half, and the remainder goes to her by *return*.

An only son takes the entire inheritance by right of *karâbet*, there being no specific share assigned to him by the law.

When the deceased is a female and leaves behind her no relation excepting a husband, who is entitled

* Excepting the widow. See *seq.* p. 92.



to succeed by virtue of the *sabab-i-zoujiyat* (matrimony), he takes the entire inheritance, first his specific share, and the remainder by return (*radd*).

When there are two or more heirs who inherit, not as *sharers*, but by *karâbet* or *sabab*, they take the estate in proportion to their respective rights. For example, when there are two sons, they divide the estate equally; when there are only a son and a daughter, the son takes two-thirds and the daughter one-third.

When there are several heirs, some connected with the deceased through the father and others through the mother, then each party takes the portion of the person through whom they are related. For example, when there are paternal as well as maternal uncles and aunts, then those connected on the father's side take two-thirds, and one-third goes to those who are connected on the mother's side. When the individuals so related to the deceased are themselves of different descriptions, then the share allotted to the group is divided according to their sex or respective individual rights. For example, if the deceased leave behind him several paternal uncles and aunts, they take two-thirds among them as a body, but the two-thirds is divided among them in the proportion of two to one, so as to give the males double the share of the females.

The children of consanguineous heirs, if not in any way excluded, take the place of their deceased or *disqualified* parents, and receive proportionately the shares of their parents. For example, if a man die,



leaving the children of a son and the children of a daughter, the first take two-thirds of the estate and divide it proportionately among them, according to their respective rights, whilst the children of the daughter take one-third (to which their mother was entitled) and divide it in the same way.

When there are two or more heirs, one or more of whom are entitled as *zû-farz* and the others as *zû-karâbet*, the *zû-farz* take their respective shares before the residue is divided among the latter.

When there are several relations some of the full and some of the half blood, those connected on the mother's side *only* take one-third, which is divided among them *equally without distinction of sex* (if only one, he or she takes one-sixth), and the residue is divided among the relations of the full blood in the usual proportions; relations on the father's side being entirely excluded. For example, if the deceased leave some full brothers and sisters and some half brothers and sisters, both on the father's and the mother's side, the *uterine* brothers and sisters take one-third of the inheritance among them and divide it *equally* without distinction of sex. If there be only one such uterine brother or sister, he or she takes one-sixth. The residue is then divided among the full brothers and sisters in the proportion of two to one, the brothers of the half blood on the father's side being entirely excluded. It is only in default of the relations of the full blood, that those connected on the father's side participate in the inheritance. For example, if a person



die leaving a brother of the half blood on the father's side, and a sister by the same father and mother, the latter would exclude the brother *in toto*. This rule applies to all cases.

The husband or widow is never excluded from succession, though the widow never takes by return, whilst the husband does.*

When there are male and female heirs of the same degree in the order of relationship, belonging to the same class, and connected equally by the tie of blood, the male takes double the share of a female. For example, a son takes double the share of a daughter; a grandson double the share of a grand-daughter, and so on. In the case, however, of heirs related on the mother's side alone, an exception is made to the above rule. For example, uterine brothers and sisters divide the share allotted to them, viz. one-third, *equally*, without distinction of sex.

When there are relations who are connected with the deceased on the father's side only, and others who are connected on the mother's side only, and both sets of relations are equal in degree and class, the two sets take their respective shares and divide the residue among themselves *pro rata*. For example, if the deceased leave behind him a sister of the half blood on the father's side and a sister of the half blood on the mother's side, both of them take their respective shares, viz. one-half and one-sixth; and the remainder,

* See *seq.* p. 92.



viz. one-third, is divided among them in the ratio of three to one.

As far as the shares are concerned, they are six in number, viz. a moiety, a fourth, an eighth, a third, two-thirds, and one-sixth.

- (1.) A moiety is taken by
 - (a) The husband, when there are no children ;
 - (b) The full sister, in default of other heirs ;
 - (c) The daughter, when only one.
- (2.) The fourth is taken by
 - (a) The husband with children ;
 - (b) The wife, when there are no children.
- (3.) The eighth is taken by the widow* with children or children's children how low soever.
- (4.) The third is taken by
 - (a) The uterine brothers and sisters, when two or more in number ;
 - (b) The mother, when the deceased has left no children, or *two or more* brothers or one brother and two sisters.†
- (5.) Two-thirds are taken by
 - (a) Two or more daughters, when there are no son or sons ;
 - (b) Two or more full sisters, when there are no full brothers or brothers of the half blood on the father's side only.

* Or widows.

† If there are children or two or more brothers or one brother and several sisters, the mother's share is reduced to $\frac{1}{6}$, though in the latter case the brothers and sisters take nothing.



(6.) A sixth is taken by

- (a) The father and the mother, when the deceased has left lineal descendants;
- (b) The mother, when there exist with her two or more brothers of the full blood or one brother and several sisters of the full blood (or by the same father only, the father himself being in existence);
- (c) The single child by the same mother only, whether such child be male or female; e.g. a uterine sister or brother.

The Succession of Relations by Consanguinity میراث
الانساب (*Mirās-ul-ansāb*).

1. The heirs entitled by virtue of *nasab* are, as already mentioned, divided into three classes (*tabkās*).

2. The relations of the first class consist of the immediate descendants of the deceased and the lineal descendants.

3. When the father exists by himself, he takes the entire inheritance.

(Same under the Sunni law.)

4. When the mother exists by herself, she takes the whole inheritance: one-third as her appointed share, and the remainder by right of return.

(Same under the Sunni law.)

5. When the father and the mother exist together, the mother takes one-third and the father takes the remainder.

(Same under the Sunni law.)



6. When the deceased leaves behind him a father, a mother, and two brothers,* the mother takes one-sixth, and the father takes the remainder, to the total exclusion of the brothers.

(Same under the Sunni law.)

7. If the father and mother exist with children, the father and mother take one-sixth each.

(Same under the Sunni law.)

8. When there is only one son, he takes the entire inheritance. If there are several sons, they divide the inheritance equally among themselves.

(Same under the Sunni law.)

[The Shiah law recognises partly the principle of primogeniture, holding that the eldest son is entitled to the sabre, the Koran, the signet, the robes of honour and other vestments of his deceased father.]

9. When there is only one daughter, she takes the inheritance, half as her appointed share and the remainder by right of return. If there are two or more, they take the entire inheritance equally, two-thirds as their appointed share and one-third by right of return.

(Under the Sunni law, they take the *entire* inheritance only when there are no other relations.)

10. When the two ascendants, or either of them, are coexisting with the descendants, then each of the ascendants receives one-sixth, and the remainder is distributed among the descendants *equally* if they

* Or one brother and two sisters, or four sisters.



be all-males; but if there be a female or females among them, then each male has the portion of two females.

(Same under the Sunni law.)

11. When a husband or wife of the deceased, co-exists with the parents and the children, then the husband or the wife takes his or her *reduced* share,* and the parents theirs, while the remainder goes to the children.

(Same under the Sunni law.)

12. When there are the two ascendants and a daughter, the ascendants receive their one-sixth respectively and the daughter her moiety, and the residue is divided among them *pro rata*, that is, the parents take two-thirtieths and the daughter three thirtieths.

(Under the Sunni law, the father takes the entire residue.)

13. When the two parents coexist with one daughter and with brothers consanguine or of the full blood of the deceased, the parents take their respective shares, viz. one-sixth, the daughter her moiety, and the remainder is divided *pro rata* between the father and the daughter, viz. in the proportion of one to three.

(Under the Sunni law, the father takes the entire residue.)

14. When the two ascendants coexist with a daughter and the husband, the latter and the ascendants take their respective *reduced* shares, and the

* Viz. $\frac{1}{4}$ or $\frac{1}{5}$.



residue goes to the daughter. For example, the husband takes one-fourth, the parents one-sixth each, and the remaining five-twelfths, goes to the daughter. But in the case of the deceased being a male and leaving a wife behind coexisting with the daughter and the parents, they all take their respective shares, viz. one-eighth, one-half, and two-sixths, and the remainder is divided among the parents and the daughter *pro rata*.

(Under the Sunni law, in the first case there would be a proportionate abatement in the shares of all the heirs, and the deficiency would not fall entirely upon the daughter. In the latter case, the father would take the entire residue.)

15. If in the preceding case there were brothers* coexisting with the relations mentioned above, then the residue would be divided only among the father and daughters.

16. When there are two or more daughters and one parent, then the latter gets his or her one-sixth, and the daughters get their two-thirds as their appointed shares, and the remainder reverts to them *pro rata* in the proportion of four to one.

17. If the deceased leave surviving her her husband and the two ascendants (parents), the husband takes his half, the mother one-third of the original estate, and the father the remainder.

* Or one brother and two sisters, or four sisters.



(Under the Sunni law, the mother takes one-third of the remainder after the allotment of the husband's share.*)

Likewise, if the deceased leave a widow behind. Representation takes place in the descending line, or, in other words, on failure of the direct descendants (the immediate children), the children of the children take the places of their respective parents in the distribution of the inheritance, with the ascendants or parents of the deceased.

18. The lineal descendants exclude from succession everyone connected with the deceased through them, and also everyone connected through the deceased's parents, but not the parents themselves. For example, they (the children) exclude the deceased's brothers and their children, his grandparents and their ancestors, his paternal and maternal uncles and aunts and their children.

(Under the Sunni law, the lineal *male* descendants alone represent their parents in the succession.)

19. Descendants nearer in degree exclude the more remote. For example, when the deceased has left a daughter and a predeceased son's son or daughter, the deceased's daughter takes the entire inheritance to the exclusion of his grandchild, on the principle of the nearer excluding the more remote.

(The Sunni law is very complicated on this point, and differs materially from the Shiah rule. Under the

* See *ante*, p. 47.



Sunni law, if the deceased leave behind him a daughter and a predeceased son's son, then the daughter takes her moiety and the residue goes to the grandson. But if, instead of a son's son, there were only son's daughters, then these would take one-sixth equally among themselves. If, however, there were two or more daughters, the son's daughters would take nothing. But if there happened to be with the son's daughters a son's son also, then the daughters would take their two-thirds, and the remaining one-third would be divided among the grandchildren in the proportion of two for each male and one for each female. A son, however, would exclude *in toto* the sons and daughters of a predeceased son.)

20. Each descendant inherits the portion of the person whose place he or she takes in the succession. For example, if the deceased were to leave behind him the child, male or female, of a daughter, that child inherits the portion of its mother, whether alone or coexisting with the parents of the deceased; and the remainder, after the allotment of the share or shares, reverts to the child in the same manner as it would have reverted to his or her mother if she had been in existence. A son's child, male or female, inherits that which is inheritable by its father—the whole, if he be alone, or the residue if he exist with the deceased's parents, husband, or wife.

(Under the Sunni law, a daughter's daughter, as an *uterine relation*, has no place in the inheritance until all heirs with a residuary title are exhausted. For



example, a father would exclude entirely, under the Sunni law, a daughter's daughter. But under the Shiah law, the father would take his one-sixth, and the daughter's daughter one-half (her mother's share), and the residue would be divided among them in the proportion of three to one.*)

21. When the children of a son coexist with the children of a daughter, the son's children take two-thirds of the inheritance (in their father's right), and the daughter's children one-third (in their mother's right).

(Under the Sunni law, the children of a daughter are uterine relations, and are postponed until the sharers and the residuaries are exhausted.)

22. When there is also a husband or wife coexisting with the grandchildren, then the husband or wife receives his or her *reduced* share, viz. one-fourth or one-eighth, and the remainder is divided among the grandchildren, the son's children taking two-thirds of the residue, and the daughter's children one-third.

The daughter's children divide their share of the inheritance in the proportion of two for each male and one for each female.

23. The grandfather or the grandmother takes no share in the inheritance whilst there is a child or an ascendant of the first degree coexisting.

The Succession of Heirs of the Second Class.

24. The second class of consanguineous heirs comprises the ascendants of a higher degree than the

* See *ante*, p. 75.



parents, viz. (a) grandparents and their ancestors, and (b) brothers and sisters and their lineal descendants.

25. If there be only one full brother, he takes the entire inheritance; when there are several, they divide the inheritance equally among themselves.

(Same under the Sunni law.)

26. If there be sisters with the brothers, the brothers take two shares each and the sisters one each.

(Same under the Sunni law.)

27. In default of full brothers and sisters, the succession passes to the consanguine brothers and sisters, and the mode of distribution is the same as in the case of full brothers and sisters.

28. When there are full brothers and sisters coexisting with consanguine brothers or sisters, these latter take nothing.

29. When there is a uterine brother or a uterine sister alone surviving the deceased, he or she receives first the *sahâm-ul-farz*, viz. one-sixth, and the remainder by *return*.

30. If there are two or more uterine brothers or sisters coexisting with full brothers and sisters, the former receive one-third, which is divided equally among them without distinction of sex, whilst the full brothers and sisters take the remainder in accordance with the general principle.

(Same under the Sunni law.)

31. When there are uterine brothers and sisters coexisting with one full sister, the former take one-



third, and the latter (the full sister) one-half, and the remainder is *returned* to her.

32. When there is only one uterine brother or sister and one full sister, the former takes one-sixth, and the latter the residue, partly as her share and partly by *return*.

33. When there are uterine brothers or sisters and two or more full sisters, the former take one-third equally among them and the latter two-thirds.

34. When there are no full brothers and sisters, then consanguine brothers and sisters take their places.

(Same under the Sunni law.)

35. The paternal or maternal grandfather, if alone, without any coheir, takes the entire inheritance; so does the grandmother.

(Same under the Sunni law.)

36. When there are ancestors of the paternal as well as of the maternal line, the former receive two-thirds, to be divided among them in the proportion of two shares to each male and one share to each female; whilst the latter, *i.e.* the maternal ancestors, take one-third, to be divided equally among them without distinction of sex.

(Under the Sunni law, the paternal ancestors* take the entire inheritance.)

37. The paternal grandfather and grandmother share in the succession according to the general principle of

* True grandfathers.



two shares for each male and one share for each female.

(Same under the Sunni law.)

38. The maternal grandfather and grandmother share equally (without distinction of sex).

(Under the Sunni law, the maternal grandmother takes the entire inheritance.)

39. When there are uterine brothers or sisters co-existing either with a maternal grandfather or grandmother, or with both, then one-third of the estate is divided *equally* among them all.

(Under the Sunni law, when there is only one uterine brother, he receives one-sixth; when two or more, one-third; the remainder goes to the maternal grandmother.)

40. When there are paternal and maternal ancestors in conjunction with full brothers and sisters, or the children of such brothers and sisters, or with brothers and sisters of the half blood on the father's side, or their children, then the maternal ancestors take one-third, and the paternal ancestors take the remaining two-thirds with the brothers and sisters or their children (being treated in the distribution as brothers and sisters themselves), in the proportion of two shares for each male and one share for each female. For example, if the deceased left behind him the mother's mother and the mother's father, also the father's mother and the father's father, besides a brother and sister, in this case one-third would be taken *equally* by the deceased's mother's mother and the mother's father,



whilst the remaining two-thirds would be divided among the brother and sister of the deceased and his paternal grandparents, in the proportion of two shares for each male and one for each female, that is, four-eighteenths would be the share of the brother and the grandfather respectively, two-eighteenths of the sister and the grandmother respectively.

41. The ancestors, however remote, inherit with brothers and sisters and their children. But when there are several ancestors, the one nearest to the deceased excludes the more distant.

42. The husband or wife coexisting with brothers and sisters or their children or grandparents, always receive their full share.

43. When there is a full sister and a *relative* of the half blood on the mother's side, the latter takes one-sixth, and the residue goes to the full sister, partly as her appointed share and partly by return.

44. When there is a sister of the half blood on the father's side instead of a full sister, the residue, after allotment of the respective shares, is divided among the maternal relations and the half-sister on the mother's side, in the proportion of their shares. For example, when there is a half-sister on the mother's side and a half-sister on the father's side, the former takes one-sixth and the latter one-half, and the remainder is divided among them in the proportion of one to three.

45. When there is a half-brother by the same



mother only and the son of a full brother, the whole of the inheritance goes to the former.

(Under the Sunni law, the half-brother gets one-sixth and the remainder goes to the son of the full brother.)

46. The children of brothers and sisters represent their predeceased parents, and each one of them inherits the portion of the person through whom he or she is connected with the deceased, or in other words, the part which is assigned to its direct ascendant.

(The children of sisters are uterine relations under the Sunni law, and do not succeed until the agnates are exhausted.)

47. When there is only one child of a brother or a sister, it takes the entire portion assigned to its ascendant.

48. When there are several children of the brother or the sister, the portion assigned to their predeceased ascendant is divided equally among them, if they be all of the same sex; when they are not all of the same sex, then the males receive double the share of the females.

49. In case there are several children of the uterine brothers or sisters, the portion which they take in right of their parents is divided equally among them.

50. The surviving children of a full sister who is predeceased, receive the moiety of the inheritance in right of their mother, "besides what may revert by return."

51. The children of a brother take the remainder



like their father, after allotment of the fixed shares. The children of two or more predeceased sisters take two-thirds, unless there is a husband or wife, when they take what remains after allotment of the husband's or wife's share.

52. In default of children of full brothers or sisters, the children of half brothers and sisters on the father's side take their place.

53. The child of a uterine brother or a sister takes one-sixth; while if there be several children, they receive one-third.

54. When there are several children of uterine brothers and sisters, as well as of full brothers and sisters and of half brothers and sisters on the father's side, the latter are excluded entirely, one-third going to the first, and two-thirds to the children of full brothers.

55. If in the above case there were a husband or a wife coexisting with the relations mentioned, the husband or the wife would take his or her full share; the children of uterine brothers and sisters would take one-third of the *original* estate (or if only one child, one-sixth); and the remainder would go to the children of full brothers and sisters; in their default, to the children of consanguine brothers and sisters.

56. The lawyers are not agreed whether when there are children of uterine brothers and those of a consanguine sister, the residue, after allotment of their respective shares, should be divided among them *pro rata*, or should go to the latter entirely.



The Succession of Relations of the Third Class.

57. This class comprises the paternal and maternal uncles and aunts of the deceased, however distant, and their children.

58. The paternal uncle; when alone, takes the entire inheritance. When there are several uncles, they divide the inheritance equally among them. The same rule applies to paternal aunt or aunts.

59. When there are paternal uncles and aunts, they take the inheritance in the usual proportion of two to one.

(Under the Sunni law, the entire inheritance goes to the paternal uncles to the exclusion of the paternal aunts.)

60. When there are uncles and aunts, some of whom are the deceased's father's half brothers and sisters on the mother's side and some are of the full blood, then the paternal uncles and aunts on the father's or mother's side take one-third among them equally, or if only one, such uncle or aunt takes only one-sixth, whilst those who are full blood brothers and sisters of the deceased's father take the remainder, in the proportion of two shares for each male and one share for each female. The consanguine brothers and sisters of the father are excluded by the full brothers and sisters.

(Under the Sunni law, the uncles who have the same father and mother as the father of the deceased, or who have the same father, that is, the full brothers



and consanguine brothers of the deceased's father, exclude all other relations from the succession.)

61. The cousin, or a paternal uncle's son, does not inherit with a paternal uncle, because in this line also the nearest always excludes the more remote, except in one case, viz. when there is a son of a full paternal uncle and a consanguine paternal uncle, the cousin excludes the uncle. This example applies only to a case where the cousin has preference over the uncle; if, instead of a consanguine paternal uncle, there were a maternal uncle or a paternal uncle of the half blood on the mother's side, the cousin would be excluded.

62. The maternal uncle takes the entire inheritance when by himself. So also, when there are two or more such uncles or aunts. When the maternal uncles and aunts of the same degree exist together, they share the inheritance equally without distinction of sex.

63. When there are uterine maternal uncles and aunts existing with maternal uncles and aunts of the full blood, the first receive one-third, which is divided among them equally without distinction of sex; and the maternal uncles and aunts of the full blood receive the remaining two-thirds, to be divided in the proportion of two for each male and one for each female. The consanguine uncles and aunts are excluded by the full uncles and aunts.

64. When there is an uncle or aunt of the maternal line and one uncle or aunt of the paternal line, the



first takes one-third and the latter two-thirds. So also if there are several of them.

65. When there are paternal and maternal uncles and aunts of the father coexisting with the paternal and maternal uncles and aunts of the mother, those related through the mother alone, *i.e.* the uterine relations, receive a third, which is divided equally among them; whilst those related through the father alone, *i.e.* the consanguine relations, receive two-thirds, one-third of which is divided *equally* among the father's maternal uncles and aunts, and the remaining one-third among his paternal uncles and aunts *unequally*, in the proportion of two shares for each male and one share for each female.

66. In default of the deceased's uncles and aunts of the paternal as well as maternal lines, and their descendants, the succession passes to the paternal and maternal uncles and aunts of his father and brother and their children; such is the case with each generation, the nearer being preferred to the more remote.

67. With reference to those who have a double title in the inheritance of the deceased, the Shiah law gives to such heir a share in virtue of each title, unless one title operates to the exclusion of the other, when the heir receives his or her share in virtue of the superior title. For example, supposing a woman dies leaving behind her a husband who is also her cousin (being the son of her paternal uncle), then this heir receives a share in the inheritance, in virtue of matrimony, as well as in virtue of the relationship of blood.



But if the deceased left behind her a half-brother on the mother's side, who is the son of his paternal uncle, he succeeds as a uterine brother, for in law, a uterine brother excludes the cousin.

Rules Relating to the Succession of Husbands and Wives (احکام الزواج) Ahkâm-ul-Azwâj.

68. As stated before, a husband or wife is never excluded from the succession. The husband receives his fixed share under all circumstances, and so does the widow, and it is only after the allotment of *their* shares, that the partition of the estate can take place among the other heirs.

69. The husband and the wife succeed to each other mutually, without any condition to that effect in the contract of marriage, when it is permanent in its nature. But as the Shiahs recognise the validity of temporary contracts of marriage, persons so married have no reciprocal right of inheritance, unless there is a condition to that effect expressly entered into at the time of marriage.*

70. A wife definitively divorced does not succeed to her former husband's inheritance;† nor does she succeed on his death if the marriage was contracted in illness and never consummated owing to such illness.‡ But if the woman died before her sick

* "Jâma-ush-Shattât."

† See *seq.*, p. 92.

‡ Marriage contracted by a person who is ill is dependent upon consummation.



husband, then the right of inheritance would vest in the husband. So also if the woman were ill at the time of marriage and died of that illness before consummation, the husband would be entitled to inherit.

71. If a woman be divorced by a husband during an illness of which he does not recover, and which eventually causes his death, her right to a share in his inheritance continues for the space of one year, so that if the husband died within the year she would succeed, but if he recovered during that interval and died either of the same disease or any other complaint, she would not succeed. The husband, however, would have no right to inherit from his wife even if she died *within* the year.

(Under the Sunni law, the right of inheritance continues until the expiration of the woman's period of probation.)*

72. The husband and the wife have a mutual right of inheritance so long as the marriage subsists in fact or constructively in law.

73. Minors contracted in marriage to each other by their fathers or paternal grandfathers have a mutual right of inheritance. But if the contract were entered into by guardians other than the fathers or paternal grandfathers, then the marriage remains in suspense until assented to or ratified by the parties on attaining majority;† and if one of them should die in the interval before the ratification of the

* See *seq.*

† See *seq.*



contract, the survivor would have no right of inheritance.

(Same under the Sunni law.)

74. If one of the minors alone attained his or her majority and ratified the contract, and the other died before attaining his or her majority, the former would have no right of inheritance. But if the ratifier died, then the part which would fall to the share of the survivor would be reserved for him or her until the attainment of majority, in order to enable the surviving husband or wife to exercise the right of option.

75. When there are no children, the husband takes one half of the deceased wife's inheritance.

76. When there are children, the husband takes a fourth.

(Same under the Sunni law.)

77. When there are several widows, they take the fourth or eighth equally among themselves.

78. The husband takes a share in all kinds of property left by his deceased wife, and so does the widow when she has a child "born of her womb," or child's child. But when she has no child, or when a child was born to her, but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only, including *household* effects, trees, buildings, &c.* She takes no interest in the real estate. When there are several widows, they take

* "Jāma-ush-Shattāt." See the case of Musst Asloo, 20 "Sutherland's Weekly Reporter."



the fourth of the personal estate *equally*. But when the widow has children, she takes an eighth of both personal and real property. If the children, however, be not of her womb, she is *not* entitled to an eighth of the real estate.

(Under the Sunni law, the widow, in default of children, takes a fourth of the entire inheritance, both real and personal. The great Shiah doctor, Shaikh Synd Murtuzâ,* is of opinion that a childless widow is entitled to a fourth of the entire inheritance. In this view he is in accord with the Mutazala doctors.)

79. A woman married under a temporary contract is entitled to inherit if there be an express condition to that effect. In that case, she succeeds like a wife married under a permanent contract.

(The Sunnis regard a temporary contract of marriage as invalid.)

80. If a woman die leaving behind her her husband as her sole heir, he takes the entire inheritance, half as his specified share and the remainder by "return." It is otherwise in the case of a widow when she is the sole heiress; she takes her one-fourth, and the residue goes to the Imâm.

There is great divergence, however, on this point among the Shiahs, one section holding the view that the widow also is entitled to take by "return."

(The Shâfeis do not recognise the right of either the husband or the wife to the residue. According to

* Abul Kâsim Ali ibn Abi Ahmed al-Hussainî *ibn-ul-Huda*.



them, whether the husband dies leaving behind him a widow as his sole heiress, or a woman dies leaving behind her husband as her sole heir, the residue, after allotment of the specific share, escheats to the *Bait-ul-mâl* or the Public Treasury. The Hanafis, in early times, allowed the residue to go to the husband but not to the widow. For example, if a woman died leaving her husband as her sole heir, he took the entire inheritance; but if a man died leaving behind his widow as his sole heiress, she took her one-fourth, and the rest escheated to the *Bait-ul-mâl*. The modern jurists,* however, are of opinion that as the *Bait-ul-mâl*, which in early times existed for the benefit of the indigent Moslems, and for the promotion of the welfare of the *Islâmic* commonwealth, is now entirely shorn of that character, being simply the Government exchequer, the doctrine of escheat does not apply to either the case of a husband or a widow. They accordingly hold that where an intestate dies leaving no other heir, excepting a wife or a husband, the entire inheritance goes to him or her. This view has been rightly adopted and upheld by the Indian Law Courts.*

81. As has been before pointed out, the Shiah law does not recognise the doctrine of escheat to the *Bait-ul-mâl*. It will be remembered that in early times and before the Shiah creed became the State

* See the "Radd-ul-Muhtâr" in *loco*.

† See the case of *Musst Subhani*, 1 "Sudder Dewanny Adawlet Reports," and the more recent decision of the Calcutta High Court in the case of *Mohammed Arshad Chowdry v. Sajida Bano*, 3 Ind. L. R. : Cal. Series, p. 702.



religion of Persia under the Seffavian sovereigns, it was the creed of a persecuted minority. To have recognised the doctrine of escheat to the public exchequer, would have implied the diversion of the intestate's property to purposes, more or less, illegal under the Shiah law. This view of the origin of the principle of escheat to the Imâm seems to be supported by a statement in the "Sharâya-ul-Islâm," that, "if the Imâm is absent or *ghâib*, the property should be distributed among the poor and the indigent, and should not be given up to any but a *pious** Sultan" for distribution in the same way.

The law on the subject of the succession of the Imâm has been already pointed out in some detail.† When the deceased leaves no heir, not even a *zâmin-i-jârirah* (a surety) or when the deceased dies leaving behind him only a widow, the whole or the residue of the property (after the allotment of the widow's share) goes to the Imâm, whether he is present or absent, for the relief of the poor and indigent of the deceased's city or village. Alî, the fourth caliph (the first Imâm of the Shiahs), used to distribute the property among the poor and indigent of the deceased's native town and among the weak and infirm neighbours of the deceased.‡ The Imâm being at the present moment absent or *ghâib*,

* Query translates the word as "legitimate." Babu Shama Churn Sircar puts it as "righteous." I think the meaning of the original word is better conveyed by the word I have used.

† See *ante* p. 65.

‡ "Jamâ-ush-Shattât," "Irshâd-i-allâmah," "Sharâya-ul-Islâm."



the property would be taken charge of by the *mujtahid* or the *hâkim* to be distributed among the indigent and helpless neighbours of the deceased belonging to the Shiah sect. Preference should always, however, be given to the poor descendants of the Prophet.

Eviction from Inheritance (موانع الارث) *Mevânah-ul-Irs.*

The Shiahs recognise three causes of eviction from inheritance, viz. infidelity (*kufir*), intentional homicide or murder (*katl*), and slavery (*rikkiyat*).

1. Those who profess a different faith from Islâm have no title to the inheritance of a deceased Mussulman. So that, if a Shiah Mussulman die leaving behind him an heir who does not profess the Islâmic faith, he is debarred from inheriting, even though he be nearest to the deceased. For example, if a man die leaving behind him a son who is a non-Moslem and a grandson who is Moslem, the son would be evicted from the succession and the grandson would take the inheritance to the absolute exclusion of his own father.

(Same under the Sunni law.)

If a Shiah Moslem die leaving behind him none but non-Moslem relations, the succession devolves to the Imâm to the exclusion of such non-Moslem heirs. Among the Sunnis, the inheritance would escheat to the *Bait-ul-mâl*. The Indian Act XXI. of 1850 has made a variation in the Mahommedan law of inheritance. The principle by which non-Moslems were excluded from the inheritance applied equally to those who were born in a different faith and those who ab-



jured Islâm. For example, an apostate from Islâm and an original non-Moslem came equally within the purview of this rule, so that, if a deceased Moslem left behind him three heirs, one of whom was a non-Moslem, the other an apostate, and the third a Moslem, the first two, under the Mahommedan law, would be excluded absolutely from the succession, and the inheritance would go entirely to the Moslem heir (though he may be remotest of all of those in the degree of proximity to the deceased). The change effected by Act XXI. of 1850 is most important. This Act consists of only one section, but its operation has had the effect of diverting entirely in many cases the course of succession from the channel into which it would have otherwise run. It enacts that "so much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

The effect of this enactment has been to do away with the provision of the Mahommedan law by which apostates were excluded from the inheritance of deceased Moslems. But the prohibition against the succession of original non-Moslems remains intact. So



that, if an apostate were to die leaving children brought up in his or her own creed, they would have no right of succession to the inheritance of their Moslem relation, though had their apostate parent been alive, he or she would have been entitled under the Act to succeed.

If the apostate die after the inheritance has opened up and the right of succession has vested in him, then the succession of his own children, though non-Moslems, would not be prevented by the evicting provision of the Mahomedan law.

A Mussulman heir is preferred to non-Moslem heirs in the succession to a deceased non-Moslem relative. So that if a non-Moslem die leaving a Moslem and a non-Moslem heir, the Moslem heir, though remote in degree, succeeds in preference to the non-Moslem heir. Were the non-Moslem, however, to leave only non-Moslem heirs, the inheritance would go to them in preference to the Imâm. If, however, any one of them should adopt the Islâmic faith, the entire inheritance would descend to him to the exclusion of the non-Moslem heirs.

(Under the Sunni law, a Moslem does not inherit from a non-Moslem, nor does a non-Moslem inherit from a Moslem.)*

When either of the parents is a Moslem, the law presumes the child to be a Moslem (until it is able to make a choice), and the right to its succession is regulated by the laws of Islâm.

* 6 "Fatâwa-i-Alamgîrî," p. 631.



The Moslems inherit from each other though they may belong to different sects.

(Same under the Sunni law.)

As regards the succession to the estate of a *murtedd*, or an apostate, the same rule applies, that is, though an apostate may not succeed to the inheritance of a Moslem relative, Moslem heirs may succeed to his inheritance.

(Among the Shafeïs, the inheritance of an apostate escheats to the *Bait-ul-mâl*, whether he leaves any heir or not.

Among the Hanafis, in the case of a male apostate, a distinction is made regarding the time when the property was acquired. For example, if the property was acquired before apostasy, it goes to the Moslem heirs; but if it was gained subsequent to the apostasy, then it escheats to the *Bait-ul-mâl*. In the same way, the portion which was acquired before apostasy goes to the Moslem heirs, and the portion acquired afterwards goes to the *Bait-ul-mâl*. This is the view of Abû Hanîfa, and the principle laid down by him is followed in most Mahommedan countries. But Abû Yusuf and Mohammed differ from Abû Hanîfa on this point, and agree with the Shiahs in holding that the entire estate of an apostate descends to his Moslem heirs.* In the case of a female apostate, however, her entire property, whether acquired before or after apostacy, goes to her Mussulman heirs.†

* Comp. Phear, J., in the matter of the application of Zaynab Bibi, September 1876, unreported.

† "Sirâjiyah," p. 58; 6 "Fatâwa-i-Alamgîrî," p. 633.



(Difference of country involving difference of allegiance is also a bar to succession under the Sunni law; but this is confined to non-Moslems only. Moslems, among themselves, though owning different allegiance, succeed to each other. The Mussulman sovereigns, however, by special treaty regulations, have granted to the subjects of non-Mahommedan Powers the privilege of taking estates by inheritance in Mahommedan countries.*)

The Shiahs do not regard difference of nationality to be a bar to succession in any case.

2. *Eviction from Inheritance arising from Murder.* Under the Shiah law, the homicide must be intentional and unjustifiable to be a bar to succession. An unintentional homicide, resulting from inadvertence or accident, does not exclude the person who has committed the act from the succession of the person killed. But the absence of intention must be clearly proved.

(Among the Hanafis, homicide, intentional or unintentional, invariably excludes from inheritance. An act, however, committed by an infant or an insane person which causes death, does not exclude such infant or such insane person from succeeding to the estate of the deceased. Or if a person kill another in justifiable war, or when inflicting punishment under the direction of law, such person is not excluded from the inheritance of the killed. According to the Shafeis, the person who causes the death of another, *under*

* See the note of Mr. Baillie on the subject, Baillie's "Muhammadan Law," pp. 30, 31.



any circumstance whatsoever, is excluded *in toto*. from the succession.)

3. *Slavery* is a bar to succession under the Shiah as well as the Sunni law. Under the Shiah law, if a person leave no other heir but a slave, his property is to be sold and the proceeds applied to the emancipation of the slave. The Sunnis do not recognise this principle, but hold that the inheritance escheats to the *Bait-ul-mâl*.

If a person should die leaving one heir free and another a slave, the whole inheritance would go to the one who is free, though he be more remote, to the exclusion of the slave though he be nearer to the deceased.

If the slave has a child who is free, it would inherit in preference to its parent.

4. *Illegitimacy* is a bar to succession under the Shiah law. But a distinction is drawn between a child of fornication (*walad-uz-zinâ*) and a child whose parentage has been formally disavowed by the father* ("a child of imprecation," *walad-ul-malâinah*). An illegitimate child is regarded as a *nullus filius*, as owning no *nasab* to either of its parents, and therefore incapable of inheriting from either. Nor, supposing the child died leaving its parents behind or relations connected through them, would they be entitled to its succession.† The *legitimate* offspring and the husband or wife, as the case may be, of an illegitimate person are entitled to inherit from such illegitimate person

* See chapter on "Legitimacy."

† "Jâma-ush-Shattât," "Irshad-i-Allâmah," "Sharâya."

and from each other *reciprocally*. But where the *walad-uz-zinâ* leaves no *legitimate* issue or any one connected by the tie of matrimony, the inheritance goes to the Imâm. The law is otherwise as regards a "child of imprecation." Such child owns a *nasab* to its mother and the maternal relations, and consequently inherits from them, and they, on their side, have the right of inheriting from such child. The disavowing father and those related through him do not inherit from such child, even though subsequently the father may acknowledge the parentage. But if the child is *acknowledged* after a formal disavowal, that is, the renunciation is withdrawn by the father, it would be entitled to succeed to its father's inheritance though not to the paternal relations.*

(Under the Sunni law, a "child of fornication" is placed on the same footing as a "child of imprecation." The *walad-uz-zinâ* inherits, like the *walad-i-malâinah*, from its mother and mother's relations, and they likewise inherit from it.†)

It must be mentioned, however, that some Shiah doctors are in accord with the Sunnis in holding that a *walad-uz-zinâ* has a right of succeeding to its mother and the maternal relations. The other doctrine has been, however, adopted and enforced by the Indian law courts.‡

* "Sharâya," "Jâma-ush-Shattât."

† "6 Fatâwa-i-Alamgîri," p. 629.

‡ See the case on this point reported in the 12th volume of "Sutherland's Weekly Reporter," p. 512.

Principles of Exclusion (الحجب, al hajb).

Exclusion is of two kinds, partial or absolute, *al hajb en bâz al farz* (الحجب عن بعض الفرض), or *al hajb en al asl* (الحجب عن الأصل).

As a general principle, the nearer relative always excludes the more remote from succession.

(Same under the Sunnî law, in the succession of agnates.)

The direct descendant of the second degree is excluded entirely by the descendant of the first degree, without distinction of sex. For example, the daughter excludes the grandson.

When there are lineal descendants of several degrees, the nearer in the order of descent excludes the more remote.

Direct descendants exclude all other relations excepting the deceased's father and mother, husband or wife.

Brothers and sisters exclude the nephews and nieces from succession.

In the collateral line, also, the nearer excludes the more remote. Thus, the collaterals of the second class, viz. brothers and sisters, and their direct descendants exclude collaterals of the third class, viz. paternal and maternal uncles and aunts and their descendants.

Full blood relations exclude the consanguine relations, provided they are equal in degree.



Ascendants of the first degree exclude ascendants of the second degree and all collaterals.

A blood relation, however remote, excludes entirely a manumittor.

(Under the Sunni law, a manumittor has precedence over the uterine relations.)

Partial exclusion, or reduction of shares, takes place in three cases :—(1) When the children of the deceased reduce the share of the widow or the husband from one-fourth or one-half to one-eighth or one-fourth. (2) When they reduce the share of the deceased's mother from one-third to one-sixth. (3) When brothers and sisters reduce the share of the mother from one-third to one-sixth, though they themselves take nothing.

The reduction of the mother's share effected by the presence of brothers and sisters is subject to four conditions :—(1) That there should be two or more brothers, or a brother and two sisters, or four or more sisters; (2) that they should be neither slaves nor non-Moslems, nor have been convicted of murder; if they are slaves or non-Moslems, or have been convicted of murder, they would not reduce the mother's share; (3) that the father should be existing also; (4) that they (the brothers and sisters) should be either full blood or consanguine.

If a person die leaving both parents, and the mother be pregnant at the time, and subsequently delivered of twin male children, these children would not reduce her share from a third to a sixth.



(The principles of exclusion under the Sunni law are analogous to those recognised by the Shiah.

E.g. Whoever is related to the deceased through another does not inherit whilst that other is living,* except the mother's children, who inherit with her (notwithstanding that they are related through her to the deceased) because she has no title to the whole of the inheritance. Among residuaries, persons nearest in the degree of affinity entirely exclude the more remote. Sisters are excluded by sons and daughters; grandmothers are excluded by a mother.)

A sister excludes the children of her deceased sister.

A daughter excludes the children of a deceased daughter.

Sons and daughters of a whole brother exclude half brothers and sisters.

Full brothers and sisters are excluded by a son, son's son, and a father and grandfather.

Half brothers and sisters on the father's side are excluded not only by the persons above mentioned, but also by full brothers and sisters.

Half brothers and sisters on the mother's side are excluded by a child, the child of a son, the father, and a grandfather.

All grandmothers, whether maternal or paternal, are excluded by the mother.†

* *E.g.* the son's son does not inherit whilst the son is living.

† The principal examples of exclusion under the Sunni law are given in the "Fatāwa-i-Alamgiri," vol. VI. p. 630.

*The General Rules of Succession.*

Whilst the effect of disqualification incident on infidelity and the commission of the crime of homicide is confined to the person who is the subject thereof—so that as regards all other persons its effect is the same as if he were actually dead—the action of the two principles of exclusion which arise from the existence of particular inheritors preferentially entitled, operates to the exclusion of a wider circle; so that a person excluded by another, may exclude others either entirely or reduce their shares, which means, that a person who is himself incapable of deriving any benefit from his relationship to the deceased is nevertheless the means of partially excluding others.*

The general rules regulating the succession of heirs may be stated shortly in the following words:—(1) The heir most nearly related to the deceased takes in preference to one more remotely connected; (2) one related by a double relationship is preferred to one connected by one tie (on the father's side); (3) whoever is related to the deceased through any person shall not inherit while that person lives; (4) when the relationship is equal, a male gets double the share of a female.†

The doctrine of *Aul* or “increase” in force among

* “Durr-ul-Mukhtâr,” p. 865.

† These general rules are recognised with very little variation by the Sunnis. The difference arises from the secondary position they give to the uterine relations.



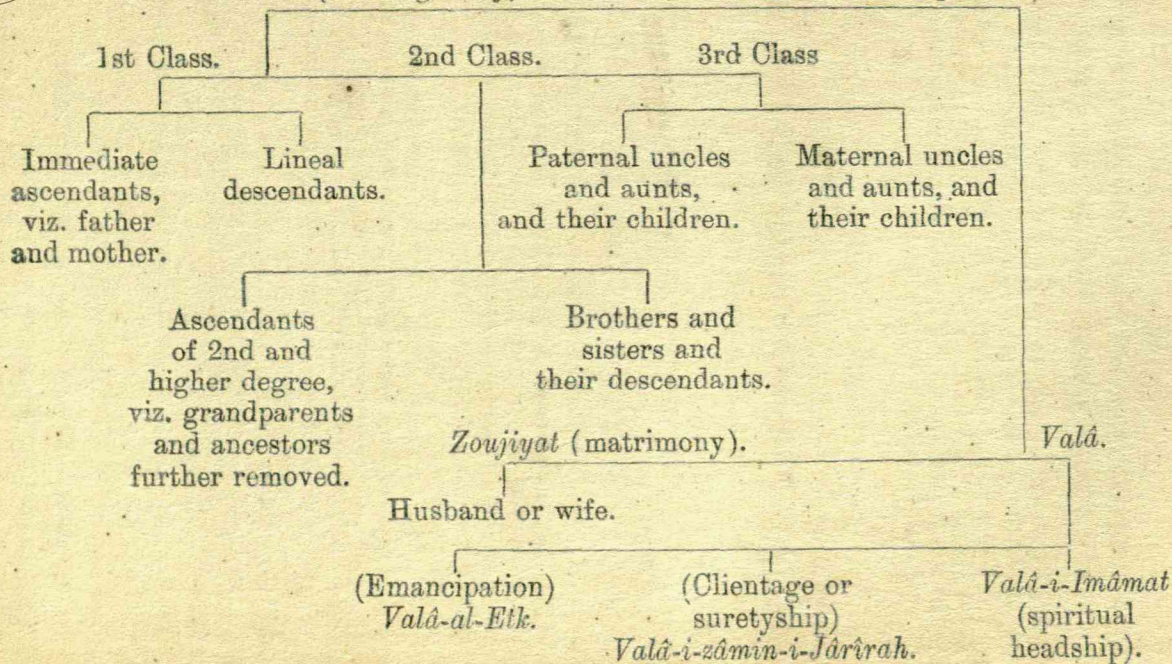
the Sunnis is considered invalid by the Shiahhs. *Increase* is a technical expression used by Sunni lawyers to signify a proportionate increase in the common divisor for the purpose of yielding the requisite number of shares. For example, if a woman leave behind her a husband, two daughters, and a mother, their respective shares would be one-fourth, two-thirds, and one-sixth. The common divisor in this case is twelve, which represents the shares into which the estate will have to be divided, three being the husband's share, eight the daughter's, and two the mother's. But three, two, and eight make thirteen. The Sunnis, accordingly, in order to give the exact number of shares to each heir, divide the property into thirteen shares.

Among the Shiahhs this arbitrary division of the property is not recognised. On the contrary, when they find that the property falls short in distribution of all the appointed shares, the deficiency falls upon the heir or heirs whose share or right is liable to fluctuation or variation.* For example, in the above case, the mother and husband would get, among the Shiahhs, their full shares, without any abatement, and the remainder, viz. seven-twelfths, would be given to the daughters in equal proportions.

* The "Mafâtih" and the "Rouzut-ul-Ahkam," both agree in holding that the deficiency falls on the daughter or daughters or on the persons (as a sister or sisters) related by both parents or by the same father alone, and not on those related on the mother's side.



SYNOPTICAL TABLE OF SHIAH INHERITANCE.

Nasab (consanguinity).*Sabab* (special cause).

SYNOPTICAL TABLE OF THE DIFFERENT ORDERS OF
SUCCESSION UNDER THE HANAFÎ SCHOOL.

All the heirs, natural, civil, or political (*Warasdi-i-murattabè*), are divided for the sake of convenience into two groups.

The first group is composed of the sharers (*Ashâb-i-Fardâz* or *Zav-il-Furûz*).

The second group is composed of the heirs who take a residuary interest, and is divided into eight classes.

FIRST GROUP.

1. The Sharers (*Ashâb-i-Fardâz* or *Zav-il-Furûz*).
(These have been specified already.)

SECOND GROUP.

2. *Ahl-i-mîrâs*.

(Heirs who take a residuary interest.)

FIRST CLASS.

Asabâh-i-Nasabiye (Residuaries by the tie of blood).

[This class comprehends all the natural heirs in the male line. They are divided into four sections and an infinity of branches, the rule being that the nearer always excludes the more remote.]

- (a.) The lineal male descendants (*juz-ul-miyêt*).
- (b.) The lineal male ascendants (*asl-i-miyêt*).
- (c.) The direct collaterals, viz. (1) full brothers, (2) consanguine brothers, (3) sons of full brothers, (4) sons of consanguine brothers (*juz-i-ab-ul-miyêt*).
- (d.) The indirect collaterals, viz. (1) full uncles, (2) consanguine uncles, (3) sons of full uncles, (4) sons of consanguine uncles, &c., (5) full uncles of the father, (6) consanguine uncles of the father, (7) sons of the full uncles of the father, (8) sons of the consanguine uncles of the father, &c., (9) full uncles of the grandfather, &c. (*juz-i-jad-ul-miyêt*).

(N.B.—The right of the female residuaries has been mentioned before.)

SECOND CLASS.

Asabâh-i-sababiye (Residuary for special cause).

The manumittor or his nearest male residuary.



THIRD CLASS.

The Sharers taking by Return (*Minn Euredde-aleih*).

The Sharers become entitled to the residue of the property after the allotment of their shares, when there are no members of the previous classes.

FOURTH CLASS.

Uterine relations (*Zav-il-arhâm*).

[This class comprises all heirs who are connected with the deceased through females. They are divided into four sections, the nearer excluding the more remote.]

(a.) The sons and daughters of daughters, and their children of both sexes, *how low soever* (*awlâd-i-benât*).

(b.) The father of the paternal grandmother and the mother of the maternal grandfather. After them their ascendants (*ajdâd-i-fâsidûn*).

(c.) The children of sisters, *how low soever* (*awlâd-i-akhwât*).
The daughters of full and consanguine brothers and their children (*benât-ul-ikhwi*).

The sons of uterine brothers and their children (*awlâd-i-ikhwi-li-umm*).

(d.) Paternal aunts, (1) full, (2) consanguine, or (3) uterine (*ammât*).

Their children in the same order.

Maternal uncles, same (*akhwâl*).

Their children, same.

Maternal aunts, same (*khâlât*).

Their children, same.

Uterine paternal uncles and aunts (*amâm-li-umm*).

Their children.

FIFTH CLASS.

Moula-al-marwâlât.

The patron of the deceased, who leaves no other heir.

SIXTH CLASS.

Mukir-unn-leh.

Adopted heir or heir by acknowledgment.

SEVENTH CLASS.

Musi-leh.

Universal legatee.

EIGHTH CLASS.

Bait-ul-mâl.

Public Treasury (for the benefit of all the Mussulmans).



NOTE I.

The following TABLE will elucidate IMAM MOHAMMED'S rule more clearly :—

S	S	S	D	D	D	D	D	D	D	D	D
D	D	D	D	D	D	D	D	D	D	D	D
S.	D _a	D _b	S	S	S	D	D	D	D	D	D
D.	D	D	S _b	D _a	D _c	S	S	S	D	D	D
D	S _a	D _c	D	D	D	S	D	D	S	D	D
D ₁	D ₂	D ₃	D ₄	D ₅	S ₆	D ₇	D ₈	S ₉	D ₁₀	S ₁₁	D ₁₂

Here are twelve people of both sexes*—three males and nine females—in the sixth generation, standing in the same rank or degree of affinity. Abū Yusuff would divide the property into fifteen shares, giving one share *each* to the females and two shares each to the males.

But Mohammed would divide the property into 60 shares, giving to claimant No. 1, 12 shares; No. 2, 8 shares; No. 3, 4 shares; No. 4, 9 shares; No. 5, 3 shares; No. 6, 6 shares; No. 7, 2 shares; No. 8, 4 shares; No. 9, 3 shares; No. 10, 2 shares; No. 11, 1 share; No. 12, 6 shares.

And this division he would make on the following basis:—

In the first column there are three males and nine females; divide the property into 15 shares, which would give exactly 2 shares to each male and 1 share to each female.

In the second column, which implies the second generation, the members happen to be all of the same sex. Mohammed passes them over.

When he arrives at the third column or the third generation, he finds under the 3 males of the first column, 1 male and

* S representing the son and D the daughter.



2 females viz. D_a and D_b . He takes the 6 shares of these 3 males and divides them among the 1 male and 2 females in the third column, in the proportion of 2 shares for the male and 1 share each for the female, so that the male gets 3 out of 6 and the 2 females get $1\frac{1}{2}$ each.

Under the 9 females of the first column, who each took 1 share, we find in the third column 3 males and 6 females. Mohammed, in order to give each male a share double that of each female, would have to make the 9 into 12, but as 12 leaves a remainder when divided among 9, he takes the 4 the resultant of 12 by the common divisor 3 and multiplies the original shares by 4, so as to give 60. Accordingly, he would divide 60 now among the original heirs (of the first generation), by which the 3 sons would get 8 each, that is, 24 among the 3 and the daughters 4 each.

The 24 shares of the 3 males of the first generation are brought down to the 3 persons just beneath them in the third generation and divided in the proportion of 2 to a male, by which the male in the first perpendicular column and the third horizontal column gets 12 for himself and the two females, viz. D_a and D_b , 6 each; the share of S, viz. 12, there being no difference or break in the sex of his heirs, is received by his female descendant (D_1) in the sixth generation.

The 12 shares of D_a and D_b in the third column is divided in the same way in the generation in which the difference of sex occurs, that is, the fifth generation, by which S_a in the fifth horizontal column gets 8 and passes the same on to his descendant in the sixth generation, and the same with D_c in the fifth horizontal and the third perpendicular column.

So that D_1 gets 12.

„ D_2 „ 8.

„ D_3 „ 4.

The 36 shares obtained by the 9 females of the first generation are divided in the 3rd generation, when the break in the uniformity of the sex takes place, in the usual

manner, by which 3 sons obtain among themselves 18 shares and the 6 daughters 18 shares. In the fourth generation, under the 3 males or sons, we find 1 male and 2 females, and the 18 shares are divided among them accordingly, giving 9 shares to S_b in the fourth column, who passes it on without break to D_4 . The 9 shares of the 2 females in the fourth generation, viz. D_d and D_e , in the fifth and sixth perpendicular columns, come down as a whole to the 2 persons in the sixth column and underneath them, and then are divided according to the usual mode, by which D_f gets 3 shares and S_g gets 6 and so on.

NOTE II.

DISTANT KINDRED.

If a person leave at the time of his death the following heirs:—

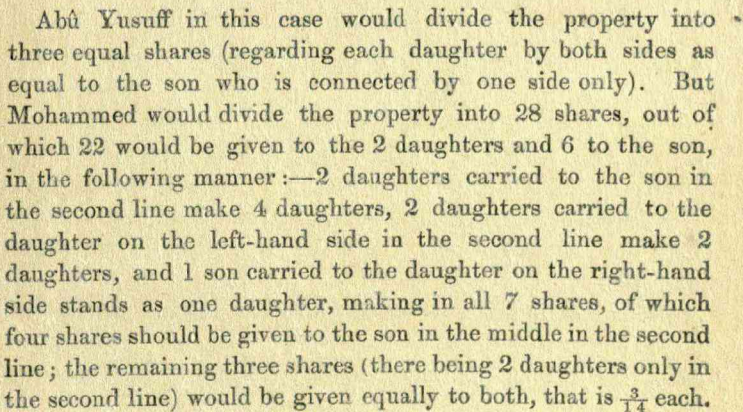
Two sons of a daughter's daughter's daughter; a daughter of a daughter's daughter's son and two daughters of a daughter's son's daughter in the following form—

Daughter.	Daughter.	Daughter.
Daughter.	Daughter.	Son.
Daughter.	Son.	Daughters.
2 Sons.	Daughter.	2 Daughters.

The 2 daughters on the right hand side carried on to the second line stand as 4 daughters, the single daughter in the middle carried to the second line would stand as *two* daughters and the 2 sons merely as *two daughters*. That would give 7 shares to be divided according to the position of the ancestor in the second line, which would give $\frac{4}{7}$ to the son in the second line and $\frac{3}{7}$ between the two daughters in



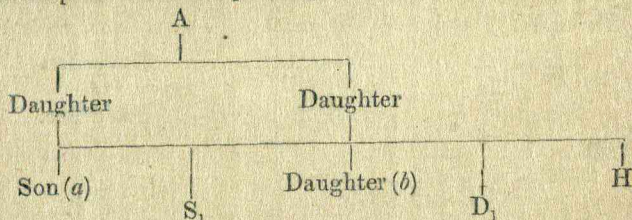
In addition to sex, consideration is also paid, in the succession of uterine relations, to the *sides* from which they are related to the deceased.* In this also the two lawyers differ. According to Mohammed, consideration is paid to the strength of blood of the persons from whom the surviving heirs derive their title, or what is called, to the sides in the roots; whilst, according to Abû Yusuff, the strength of blood in the heirs themselves, or what is called, the sides in the persons, is considered,† *e.g.* :—



† Imâm Mohammed is followed in India.

In this way 28 shares are required to give integral shares, that is, $\frac{4}{7}$ of 28, i.e. 16 to the son which comes down to the daughters, and $\frac{2}{14}$ of 28, i.e. 6 again, to the daughter on the left-hand side in the second line, which also comes to the 2 daughters; and $\frac{3}{14}$ of 28, i.e. 6, to the daughter on the right-hand side in the second line, which comes to her son.

To take another case; suppose a man (A) had two daughters, both of whom died during his lifetime, one leaving a son (a), and the other a daughter (b). These two intermarried, and had one male issue (S_1). Subsequently, on the decease of her first husband (a), the daughter (b) marries H, of which union there is one female issue (D_1). Now, A dies, leaving behind him only S_1 and D_1 . How is the property to be divided?



In this case Abû Yusuff would take the son, being doubly connected, as 4 daughters, and divide the property *per capita*, giving to the son 4 shares and to the daughter 1 share. But Mohammed would divide it into 6 shares and give 5 shares to the son and 1 to the daughter, in the following way:—the son in the second line takes $\frac{2}{3}$ and passes on to his son, the daughter in the second line takes $\frac{1}{3}$, a moiety of which also she passes to her son, who thus gets $\frac{5}{6}$, and the remainder, $\frac{1}{6}$ goes to the daughter.*

With reference to the succession of the uterine relations of the second class, which comprises the excluded grandfathers and grandmothers, the succession is regulated by the following rule:—

If the claimants be equal in degree of affinity and distance and there be none among them who is related through a

* Baillie's "Digest of Muhammadan Law (Sunni Branch)," p. 707.



sharer or residuary, or all of them be related through heirs, then, if the sex of those through whom they are related agree and their relation be also on the same side (either through the father or the mother of the deceased), then the property would be distributed equally among them.

If, on the other hand (notwithstanding their being equal in degree), the sexes of those through whom they are related differ, then the property is distributed according to the first rank that differs in sex, as happens in the first class: that is, the division will begin to be made in the rank or line when the difference first appears, on the principle that a male has double the portion of a female, and then the males will be grouped in one class and the females in another, and their shares passed on in the usual manner.

If the relation, however, differs, that is, the claimants be connected respectively through mother and father (notwithstanding equality in degree), the property is divided in the principle of double shares to the claimants connected through the father and one share to those related by the mother: that is, two-thirds would be given to those connected by the father's side as a group and one-third to those connected by the mother's side as a group.

[The general rule with reference to this class of distant kindred may be stated thus: If their relations are not equal then the nearest is preferred; if equal, and the sides of relationship differ, then the distribution takes place by the principle of double shares to those connected on the father's side, and one share to those connected on the mother's side; if they agree in side, that is, the strength of blood and distance, and the "roots" agree throughout in sex, then the distribution takes place according to the number of claimants; but if the "roots" differ in sex, then the property should be divided according to the difference of sex in the highest rank, as in the first class.]

The succession of the distant kindred of the third class, which includes sister's children, brother's daughters, and the sons of brothers by the same mother only, is also regulated



by the rule that the nearest succeeds in preference to the more remote, but when all are equal in degree, the child or children of a residuary is preferred to one who is not; for example, if a man leaves a son of a sister's daughter and a daughter of a brother's son,—both equidistant from him—the whole estate goes to the daughter of the brother's son, because she is the child of a residuary, namely, the son of a brother.*

In the case of children of brothers and sisters by the same mother only, they share equally, both males and females.†

NOTE III.

Under the Sunni law, when there are Sharers and no Residuaries, the *residue* of the property, after the shares have been paid to the Sharers, is divided by the principle of Return among them in the proportion of their shares.

The early lawyers held that neither a husband nor a wife was entitled to take by Return, but later jurists, as stated in the text, have held that when there are no other heirs, the husband or widow takes by return.

The persons to whom there may be a return are seven in number: (1) mother, (2) grandmother, (3) daughter, (4) son's daughter, (5) full sister, (6) half sister by the father, (7) half brother or sister by the mother. And a return may take place to one, two, or three classes at the same time. But no more than three can take by return at one and the same time.‡

The residue after allotment of shares is apportioned among the parties indicated, in the proportion of their shares, *e.g.*—

When there is a grandmother and a sister by the same mother of the deceased, the shares are $\frac{1}{6}$ each, therefore the residue is divided among them equally.

When there is a daughter and mother, the shares are $\frac{1}{6}$ and $\frac{1}{2}$, therefore the residue is divided among them in proportion to their shares, which will be $\frac{1}{12}$ and $\frac{3}{12}$.

* "Sirrajiyah," p. 45.

† "Sirrajiyah," p. 45.

‡ "Durr-ul-Mukhtar," pp. 868, 869.



When there are two wives, a mother, and three daughters, the wives take between them $\frac{1}{8}$.

Mother, $\frac{1}{8}$ of $\frac{7}{8} = \frac{7}{64}$.

3 daughters, $\frac{4}{3}$ of $\frac{7}{8} = \frac{7}{10}$, each = $\frac{7}{30}$.

L. C. D. = 240.

$\therefore$ each wife = 15, 2 wives = 30

Mother = 42

Each daughter = 56, 3 daughters = 168

240

Or—Mother : daughter = $\frac{1}{8} : \frac{1}{2} = 1 : 3$.

Mother — $(\frac{1}{8} + \frac{1}{12} = \frac{2+1}{12}) = \frac{1}{4}$.

Daughter — $(\frac{1}{2} + \frac{3}{12} = \frac{6+3}{12}) = \frac{3}{4}$.

Or—Wife, mother, and daughter.

Wife = $\frac{1}{8}$.

Mother : daughter = $\frac{1}{8} : \frac{1}{2} = 1 : 3$.

Mother = $\frac{1}{4}$ of $\frac{7}{8} = \frac{7}{32}$.

Daughter = $\frac{3}{4}$ of $\frac{7}{8} = \frac{21}{32}$.

Wife, 4 ; mother, 7 ; daughter, 21.

2 wives, 1 mother and 3 daughters.

2 wives = $\frac{1}{8}$, one wife = $\frac{1}{16}$.

Mother : 3 daughters = $\frac{1}{8} : \frac{3}{8} = 1 : 3$.

When there happen to be a mother, a daughter and son's daughter, the shares are respectively $\frac{1}{8}$, $\frac{1}{2}$ and $\frac{1}{8} = \frac{5}{8}$; the residue is divided then among them in proportion to their shares, that is, $\frac{1}{8}$ to the mother, $\frac{1}{2}$ to the son's daughter, and the daughter $\frac{3}{8}$.

Or—Mother and son's daughter together take $\frac{3}{8}$.

Daughter = $\frac{3}{8}$.

$\therefore$ Mother and son's daughter :

daughter = $\frac{2}{8} : \frac{3}{8} = 2 : 3$.

$\therefore$ Daughter takes $\frac{3}{8}$.

Mother and son's daughter, $\frac{2}{8}$.

And so when there is a daughter with a son's daughter.



Or, put in the way adopted by the Arabian jurists, in which instead of adding afterwards a share of the residue to the original share, the shares are originally divided among the parties as they would be taken, by way of return.

For example—

4 wives, $\frac{1}{8}$, each $\frac{1}{32}$

9 daughters and 6 true grandmothers have $\frac{7}{8}$ between them.

To be divided in the ratio of $\frac{2}{3} : \frac{1}{8} = 4 : 1$

∴ 9 daughters = $\frac{4}{9} \times \frac{7}{8} = \frac{7}{10}$, each $\frac{7}{90}$

∴ 6 grandmothers = $\frac{1}{6} \times \frac{7}{8} = \frac{7}{48}$, each $\frac{7}{240}$

L. C. D. = 1,440.

Each wife 45, daughter 112, grandmother 42.

NOTE IV.

DOUBLE INHERITANCE OR VESTED INTERESTS.

But take a case where a deceased leaves a certain number of heirs, and one of them, before distribution takes place, happens to die leaving heirs. In such cases these heirs take under both the deceased, if they are heirs of both; or under one of them if they are only heirs to one. For example, a man dies leaving a son, a daughter, and a half-brother by the father. In this case the son excludes the half-brother; but before distribution the son dies leaving only the sister and his half paternal uncle as his heirs. In this case the son's $\frac{2}{3}$ is divided equally between his sister and his uncle, the former getting half of $\frac{2}{3}$, viz. $\frac{1}{3}$, and the latter the remaining $\frac{1}{3}$.

Take another example of a more complicated character from the "Sirrajyah"—

(1.) A woman dies leaving

(a.) A husband = $\frac{1}{4}$

(b.) Daughter and mother = $\frac{1}{6} : \frac{1}{2} = 1 : 3$

Daughter = $\frac{3}{4}$ of $\frac{2}{4} = \frac{3}{8}$

(c.) Mother = $\frac{1}{4}$ of $\frac{3}{4} = \frac{3}{16}$

DOUBLE INHERITANCE.

119

(2.) Husband dies leaving

(a.) Daughter = $\frac{9}{16} + \frac{1}{2}$ of $\frac{1}{4} = \frac{11}{8}$

(b.) His wife = $\frac{1}{8}$ of $\frac{1}{4} = \frac{1}{32}$

(c.) His mother = $\frac{1}{6}$ of $\frac{1}{4} = \frac{1}{24}$

(d.) His father = $\frac{1}{4} - (\frac{1}{8} + \frac{1}{32} + \frac{1}{24}) = \frac{24-19}{96} = \frac{5}{96}$

(3.) Daughter dies leaving

(a.) Paternal grandfather = $\frac{5}{96} + \frac{1}{6}$ of $\frac{11}{8} = \frac{115}{96}$

(b.) Paternal grandmother = $\frac{1}{24} + \frac{1}{6}$ of $\frac{11}{8} = \frac{115}{96}$

(c.) Maternal grandmother = $\frac{3}{16} + \frac{1}{6}$ of $\frac{11}{8} = \frac{29}{96}$

(d.) 2 sons, (each) = $\frac{2}{5}$ of $\frac{11}{32} = \frac{11}{80}$

(e.) 1 daughter = $\frac{1}{5}$ of $\frac{11}{32} = \frac{11}{160}$

Reducing these fractions to the L. C. D.—

$$\begin{array}{r} | 16, 32, 96, 80, 160 \\ \hline \end{array}$$

$$4 \begin{array}{r} | 96-160 \\ \hline \end{array}$$

$$4 \begin{array}{r} | 24-40 \\ \hline \end{array}$$

$$2 \begin{array}{r} | 6-10 \\ \hline \end{array}$$

$$3-5$$

$$4 \times 4 \times 2 \times 3 \times 5 = 480$$

Mother of the original deceased, that is, maternal grandmother of the last deceased = $\frac{29}{96}$ of 480 = 145

Father's wife = $\frac{1}{32}$ of 480 = 15

Father's mother = $\frac{115}{96}$ of 480 = 75

Father's father = $\frac{11}{80} \times 480 = 80$

Sons, $\frac{11}{80}$ each = 132

Daughter, $\frac{11}{160} = 33$

Total 480.



NOTE V.

Under the Sunni law descendants in the male line of the paternal great-grandfather of an intestate are within the class of residuary heirs and entitled to take to the exclusion of the *children of the intestate's full sisters*.

Likewise descendants of a paternal grandfather's brother are residuaries and entitled to the inheritance in preference to grand-daughters in the female line.*

NOTE VI.

Brothers and sisters of the whole blood and those on the father's side are excluded by the son, the son's son (how low soever), the father, and also the grandfather.†

The brothers and sisters by the same father only are excluded also by brothers of the whole blood, and likewise by a sister of the whole blood when there is a daughter or son's daughter coexisting with her.‡

NOTE VII.

The Mālikīs and Shāfēīs are in general accord with the Hanafīs in the broad principles upon which the Sunni system of classification is based. For example, they also divide the heirs into the three classes, viz. *sharers*, *residuaries*, and *uterine relations*, recognised by the Hanafīs. With reference to the *sharers* there is no difference. As regards the *Asabāh*, there are many points of divergence between the Hanafīs on the one side and the Shāfēīs and Mālikīs on the other. These allow the right

* 8 "Sutherland's Weekly Reporter," 39.

† "Durr-ul-Mukhtār, p. 866; Abū Hanīfa's opinion is followed in India; Baillie's "Digest," p. 689.

‡ "Durr-ul-Mukhtār," p. 866; "Sirrājīyah," p. 18.



of succession to the *Asabâh-bè nafsehi* (residuaries *proprio jure*) in the collateral branch up to the 6th degree only (see the table on the next page).

Among them the husband or wife, the grandmother, the uterine brothers and sisters never take the residue of the property after the allotment of their respective shares. The grandfather does not exclude (as among the Hanafis) the brothers from succession; he takes one-third and the rest goes to the brothers whether full or consanguine.

In default of the *Asabâh*, whether *asabâh bè nafsehi*, *bè ghairahi* or *mè ghairahi*, in their own right, in another's right, or with another, or for special cause, as the manumittor or his residuary, the property of the deceased goes to the *Bait-ul-mâl*.*

NOTE VIII.

The ancient Arab customs had one principal object in view in the succession of the property of a deceased, viz. the maintenance of the goods in the family. With this view, the succession was confined exclusively to the male relations, and even among them to those who were capable of bearing arms. The daughters, the widows, the mothers, as well as the minors, were directly or indirectly excluded from succession; the daughters because their birth was regarded as a misfortune,† and because they ceased upon their marriage to be members of the natural family; the widows because they were placed in the same category as slaves and passed ordinarily into the hands of their husband's heirs as a portion of the patrimony;‡ the minors because they were unable to defend by their arms the tribal rights and privileges, and their goods therefore belonged to their tutors.§

* "Al-Muharrir."

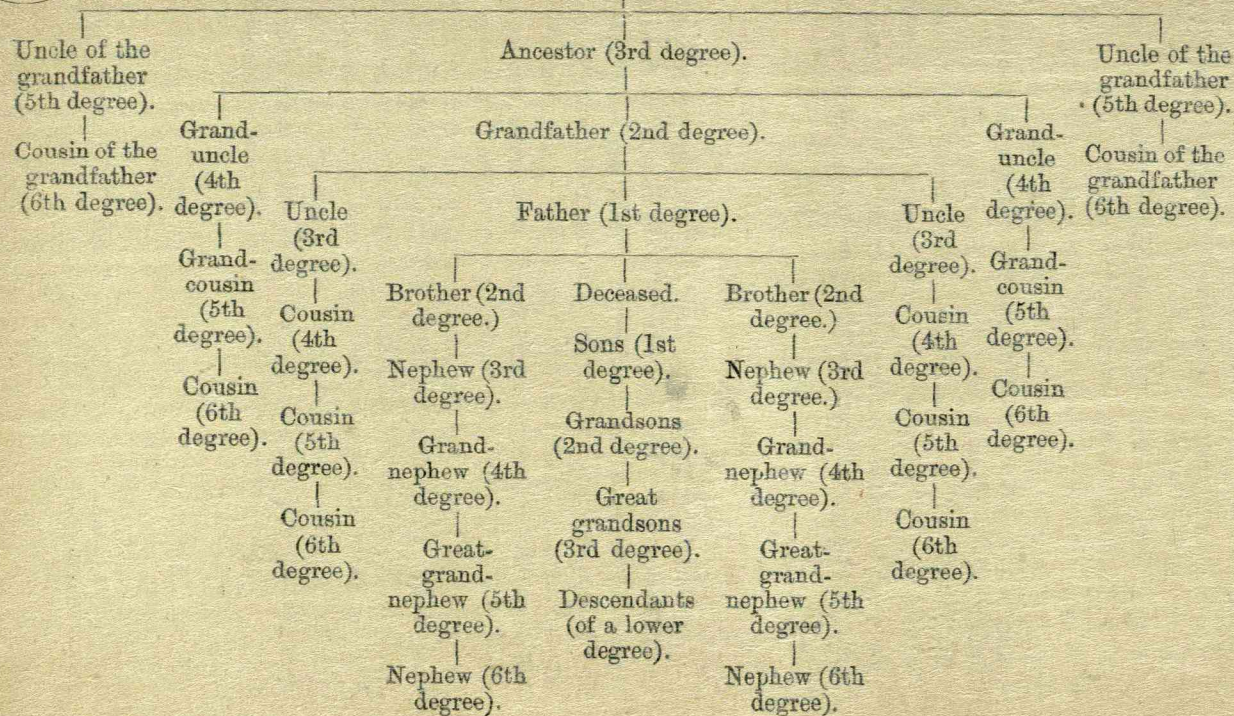
† Koran, chap. lxxxi., v. 8.

‡ Koran, chap. xliii., v. 16.

§ Koran, chap. iv., vv. 2, 4, 5, 6, 7, and 11; chap. vi., v. 153 chap. xvii., v. 36.



TABLE of ASABÂH *proprio jure*, according to the MÂLIKÎ and SHÂFÊÎ SCHOOLS.
Ancestor (4th degree).





Among the Jewish tribes who followed the Rabbinical law, the succession devolved in the first place on the sons, and the lineal male descendants, then on the daughters and their descendants, then on the father; fourthly, on the brothers and their descendants; fifthly, on the sisters and their descendants; and, sixthly, on the grandfather, the uncles, the aunts, and so on.

Among the descendants the sons had preference over the daughters, who occupied a secondary position even to their brother's daughters. When a man died leaving the sons of a predeceased son and also the daughters of another predeceased son, the property was divided *per stirpes*, each group taking the share to which the person from whom they respectively received their title was entitled. The same rules applied to the succession of collaterals. The mother inherited nothing from her children. Illegitimate children when acknowledged had the same rights as the legitimate offspring. The succession of an illegitimate child devolved first upon the father and, in his absence, passed to the state, or the communal fund, as the case proved to be. The mother never took anything.

The uterine brothers and sisters had no right of succession.*

The Arabian Legislator reformed the entire pre-Islamic customs. He gave, by express provision of the law, rights of inheritance to those who were excluded by the ancient institutions.† One of the great results of the new legislation was to raise women in the scale of civilisation, by elevating their moral and social position, and giving the widow, the mother, the daughters, and sisters heritable rights.

* Comp. M. Sautayra.

† See Koran, chap. iv., v. 8, 12, 13, 14, 15, 57, and 175.



CHAPTER II.

THE CONFLICT OF LAW.

WE have thus far treated of the Mussulman law of inheritance, with especial reference to the differences existing between the Shiah and the Sunni schools on that branch of the subject.

We now proceed to discuss the personal law of the Mussulmans properly so called—the law in fact which regulates the *status* of individuals subject to the Islâmic system.

With the exception of certain principles, the operation of which is necessarily confined to the territorial limits of Islâm, the Mussulman law generally is a personal law; that is, its incidents remain attached to the individual Moslem whatever the domicil, so long as he continues even outwardly faithful to the commonwealth of Islâm. “A Mussulman,” says the “Kifâyah,” “is absolutely subject to the laws of Islâm,



whatever the domicil." * This is not the case with born Mussulmans alone. As soon as a person belonging to a different persuasion changes his faith for the religion of Mohammed, or adheres to the Islâmic system, all the civil obligations and duties which the Mussulman law imposes, and the rights and privileges which it gives, become attached to the new proselyte. According to the Mahommedan law, therefore, a mere change of domicil, when unaccompanied by a change of system, effects no alteration in the status or legal capacity of Moslems.

It will be observed that this claim to exclusive jurisdiction is not peculiar to Islâm. At least, analogous principles are to be found in several Western systems of law. According to the Mahommedan jurists, adherence to Islâm implies allegiance to the Islâmic commonwealth, and consequently such allegiance is the test of the civil rights and liabilities of Moslems. Under the Italian and the French law it is the same,—allegiance instead of domicil furnishing the test of civil rights. The difficulties, therefore, which would arise from a conflict between the English and the Mussulman law would not occur in Italy or in France. A Moslem Turk or a Moslem Persian domiciled in Italy, as long as he retained his religion, would be presumed to retain his allegiance to the sovereign of his native country, and his status and the succession to his property would be governed by the laws of

* 2 "Kifâyah," p. 763.

his nation. But if he naturalised himself in either of these countries, without changing his faith, how would his rights and duties be regulated? Would the abandonment of his allegiance to the sovereign of his native country imply the renunciation of an adhesion to the Islâmic system? The Mussulman law gives a categorical negative to the above question, and would insist upon his continuing subject to the jurisdiction of the laws of Islâm. The case, however, will be regarded differently by the Italian or French law, and the Moslem who settled in France or Italy and naturalised himself there would thenceforward be subject to the laws of that country.

Owing to the state of belligerency which existed originally between the Islâmic commonwealth and the hostile nations of the East and the West, the early Moslem jurists, like the Christian jurists of later times,* divided the civilised world into two great portions—the *Dâr-ul-harb* and the *Dâr-ul-Islâm*—the territories of war and the territories of peace. These two divisions, one of which represented the land of infidelity and darkness, the other that of light and faith, were supposed to be always inimically inclined towards each other. But the Mahommedan law allowed ampler guarantees of personal safety to non-Moslems who en-

* Grotius and Puffendorf expressly excluded the Mussulmans from all community of interest with the so-called civilised Christian nations of Europe; and even later international jurists countenance the view that international law is limited to Christendom; Woolsey, "Int. Law," § 5.



tered the territorial limits of Islâm for purposes of trade or commerce, than were recognised in Christendom. A non-Moslem entering a Moslem country was regarded as a guest, even if the *âmân* or guarantee which he received on the frontier was granted to him by an ordinary villager. He was allowed to remain unmolested in the country for a year. At the end of this period, however, he was bound to leave, or to take up definitively the status of a *zîmmi* or tributary, when he became liable to the payment of the usual *kharrâj* or taxes, and also became entitled to the privileges which the Mussulman law gave to its own non-Moslem subjects.

A Mussulman going to a foreign country was always presumed to have an *animus revertendi*. He could under no circumstances abandon the domicile of Islâm; and if he did so or acquired a foreign domicile in the *Dâr-ul-harb*, he was presumed to have apostatised, and the law considered him civilly dead. This rigorous stricture on the comity of nations was the natural result of the hostilities in which the Moslems became involved with the neighbouring countries after the death of the Prophet. Since, however, the Moslem sovereigns have entered into treaty stipulations with the Christian Powers of Europe, and Christendom itself, renouncing its former bigotry, has admitted to some extent at least, the Mussulman nations to the common enjoyment of the *jus gentium*, the rigour of the Mahommedan law has been considerably relaxed. A Mussulman, therefore, may now



acquire a foreign domicile without ceasing to be a Moslem.*

The new conditions of modern political necessities, when millions of Mahommedans are subject to non-Moslem governments, and are protected as *Mustâmins*† in the enjoyment of their civil rights and privileges, would also affect materially the ancient view of the Mussulman law. Under these new circumstances, a Moslem residing in one particular dependency where the laws of Islâm are strictly in force, may remove to another part of the same empire where the Islâmic law would be only partially recognised, and yet acquire there a permanent domicile, without contravening the spirit of the Mahommedan legislation. For example, a Mahommedan born within the territorial limits of British India may acquire a domicile in Great Britain or Ireland without ceasing to be a follower of the Faith, as a change of domicile in this case would not imply or necessarily involve a change of allegiance.

It would seem that the early Mussulman jurists had in view cases of this nature when they declared that whilst Moslems could not absolutely forego their original domicils, they could remove from one province to another of the same empire subject to the same sovereign.‡

* "Tableaux Gen. de l'Empire Ottoman," vol. iii., part i.

† See note at the end of the chapter.

‡ "Tatâr-Khâniyè"; "Tableaux Gen. de l'Empire Ottoman," vol. iii.



According to the English law, status depends *primâ facie* on domicile, subject, of course, to various exceptions and limitations too numerous to detail. "The law of domicile," says Dicey, "affects, though it does not wholly govern, the rights" which relate to status, marriage, divorce, and movables. The status, therefore, of a Mussulman temporarily residing in England would be governed by the provisions of the Mahommedan law, unless they are in conflict with the English law or "natural justice." His capacity for the acquisition and exercise of legal rights, and for the performance of legal acts, would depend necessarily on the law of his domicile. British India is, to all intents and purposes, in the eye of the Mahommedan law, a portion of the *Bilâd-i-Islâm*. And 39 Geo. III. c. 71, having expressly declared that in India the law relating to the Mahommedans shall, in all matters relating to them, be strictly and impartially administered, it may be assumed that, as far as the Indian Mussulmans are concerned, the law of their domicile would mean the Mussulman law.

As long as a Mussulman retains his original domicile, so long his status and his personal capacity to do certain legal acts remain subject to the Islâmic law. The moment, however, he abandons the domicile of origin, or as soon as he acquires or adopts a new domicile, he ceases to be governed by the law of his nation. For example, an Indian Mussulman when he once takes up his abode permanently in England, or shows distinctly by some conduct on his part that his



stay in the country is not in the nature of a sojourn, but that he has what is called an *animus manendi*, is subject thenceforward, in all matters relating to succession and personal status, to the English law. He ceases to be under the jurisdiction of the Mussulman civil law. The moral and religious portions of the law remain binding upon his conscience, but his subjection to the jurisdiction of the English law has the effect of withdrawing him from the *régime* of the law of his own nation. How far this is in accord with the spirit of the Mahommedan law will be apparent from what has been stated before. Under the Italian, and probably under the French law, he would remain subject to the Islâmic system, in spite of a change of domicil, so long as he retained his allegiance.*

As the *lex loci rei situs* governs all questions which relate to immovable property, the succession to the real estate of a Moslem, whether temporarily residing in England or permanently domiciled, would be governed by the law of the place where the property is situated. So also in the case of *wakfs* and *hibas* (endowments and gifts) of real property. Here again arises a conflict between the English and the Mussalman law. Under the Mussulman law, as under the Code Civil,†

* It has been mentioned to me by Mr. Frederick Harrison, one of the greatest authorities on international law in this country, that the rules of the "Code Napoléon" have been somewhat encroached on by later practice in France, but the new Italian code is very explicit.

† Art. 913.



a person cannot devise away his entire property to the prejudice of his natural heirs. Under the English law he can. Consequently, if the property is situated in England, a Moslem, whether temporarily residing in this country or permanently domiciled, can leave his entire real estate by a testamentary disposition, regardless of the claims of his heirs under the Mahomedan law. If the disposition relates to movable property, it would be governed by the Mahomedan law, if the testator was not domiciled in England. Would a *wakf*, however, of what are called "chattels real" in English law be governed by the Mussulman law or by the *lex situs*? Probably the latter. In the same way, succession to immovable property situated in England would be regulated according to the English law, whether the deceased owner was domiciled in England or not. For example, if a Mahomedan died leaving certain real estate in this country, and two sons, the elder of whom was a non-Moslem, such elder son would take the entire inheritance to the exclusion of the younger brother, despite the disqualification attached by the Mahomedan law.

Under the English law, real property must go to the "heir," and a man must, in order to be an heir, not only be the eldest, living, legitimate son of his father, but must be born in *lawful wedlock*, "within the state of lawful matrimony" recognised by the law of England.* It will be seen, therefore, that in the

* *Birtchistle v. Vardill*, 2. Cl. and F. pp. 571-573.



succession to real estate situated in England, the descent will be regulated strictly according to the provisions of the English law, without the least regard to the rules which govern questions of inheritance under the Mussulman law. For example, a Moslem, residing but not domiciled in England, dies leaving two children, the issue of two separate contemporaneous marriages, viz. a daughter born of the first wife, and a son born of the second wife. He leaves also certain immovable property situated in England. The son, no doubt, fulfils the first condition required by the English law, for the purpose of succeeding to the real estate of his father; that is, he is indisputably "the eldest, living, legitimate son of his father." His status of legitimacy is not affected nor altered by the English law. It depends on the law of his father's domicile, and as under the Mussulman law the union of his parents was valid and legal, he is under the English law also the legitimate son of his father. But as the English law does not recognise the legality of contemporaneous unions, he would not be considered as "born in *lawful* wedlock," and therefore not entitled to succeed as "heir" to real property situated in England. Nor would he be entitled to transmit the right to land situated in England to his father or to collateral relations.* And yet, being legitimate and the *nasab* being established according to the law of the father's domicile, viz. the Mussulman law, he would

* See *Re Don's Estate*, 4 Drew, 194; 27 L. J. (Ch.) 98.



not be regarded as a "stranger in blood" to his father.*

It will be seen, therefore, that there is little or no doubt as regards the position of a Moslem domiciled in England; nor is there any question regarding the law which is applicable to the succession or disposition of real estate situated in England. The position, however, of a Mussulman temporarily resident in England requires consideration, as his status and personal capacity are entirely governed by the law of his domicile.

According to the Mahommedan law, when one of the parents is a Moslem, the child born of a mixed union should be presumed to be a Moslem.† Under the English law, a legitimate child is presumed to belong to the communion of the father. As the Islâmic system recognises the lawfulness of the unions contracted between Moslems and non-Moslem females, but not *vice versâ*, no conflict is possible between the English and the Mussulman law respecting the religious belief of a child born of a mixed union. For, if a Mussulman were to marry a Christian woman in England, such marriage would be validly contracted both under the English as well as the Mahommedan law, and the child of such union would belong to the creed of the father. If, before entering into a contract of marriage, the parties should

* See *Skottowe v. Young*, L. R. 11, Eq. p. 474.

† "Sharâya," p. 442; "Hed." Bk. ii. chap. v.; 2 "Sharu Vikâyah," p. 134.



enter into a specific agreement with regard to the rearing of the children, such agreement would be valid under the Mahommedan law, even though it may be stipulated that some of the children should be brought up as non-Moslems. But such children will be "excluded" from the inheritance of their Moslem father, by the operation of the disqualifying provisions of the Mussulman law, unless the father were domiciled in England, or the estate were real and situated in England. But the father may, though domiciled in the *Bilâd-i-Islâm*, by a testamentary disposition leave to such children and the wife not more than one-third of his entire property.

A marriage between a Moslem and a non-Moslemah celebrated in a foreign country is valid under the Mahommedan law, if it is performed in accordance with the requirements of the *lex loci contractus* or the rites of the communion to which the wife belongs. This principle of the Mahommedan law coincides with the English law. According to the English law the *capacity* to contract a marriage is judged by the respective *lex domicilii* of the parties; but the *form* of the contract, generally speaking, is governed by the law of the place where the contract is entered into. Similarly, under the Mussulman law, the legal capacity to enter into the marital state is governed by the Islâmic rules, but the form of the ceremony is regulated by local customs and rites. For example, the Mahommedan law recognises the validity of a marriage between a male and a female who are *sui juris*



and with reference to whose union there is no legal impediment, regardless of the particular form or mode in which such marriage is celebrated. A Mahommedan may marry a Hebrew or a Christian female, and such marriage may validly be celebrated either according to the rites of the communion to which the wife belongs, or as a civil act before the officer of the state regularly authorised to perform the ceremony or register its *factum*.

Would it, however, be necessary, in case of the return of the husband to his native land, to go through any other ceremony to validate the previous marriage? The French Courts have answered this question in the negative, and their decisions are in conformity with the principles of the Mahommedan law. A Möslem marriage is a purely civil act. Its validity depends on the legal capacity of the parties to enter into a binding contract. Proposal and acceptance are the sole essential ingredients which constitute a valid Mahommedan marriage.* If the man is "adult" and "discreet," that is, if he is over fifteen years of age, and is capable of understanding the nature and legal consequences of his acts—in fine, if he is not a *sarîr* (minor), or a *safih* (*non compos mentis*); if the woman also is adult and discreet, and they both contract themselves in marriage, it is valid in law, either with or without evidence. So that an union contracted in a foreign country, before a civil officer expressly authorised to register marriages, is

* See the chapter on Marriage.



sufficient to constitute a valid marriage, and no fresh ceremony is needed on the return of the husband to his native country.*

If a Moslem who acquires a foreign domicile in a country where polygamy is prohibited, has at the time two wives co-existing, the mere fact of a change of domicile will not annul or render void the second union, but neither the husband nor such wife will have any enforceable rights against each other. But though she may not be entitled to sue him for maintenance or restitution of conjugal rights, there is no rule of law to show that she would be precluded from sharing in his *Irs*† upon his decease. The right of succession possessed by her came into existence on her marriage—a marriage validly contracted and never set aside; and she would, therefore, be entitled to take a share in her husband's estate (*mîrâs*), despite the fact that the law of the present domicile did not recognise her original status.

If a Mussulman temporarily residing in England does an act which, though valid under the English law, is invalid under the Islâmic law, what would be its effect upon his return to his native land? For example, suppose a Moslem were to marry an idolatrous heathen woman in England—such a marriage would be valid under the English law but invalid under the Mahommedan code. What would be the effect of

* See the precedents in Sautayra; all the schools are in accord on this point. See the "Jâma-ush-Shattât."

† *Irs*, inheritance.



such an union on the return of the husband to the territorial limits of Islâm? Probably under the Mahomedan law it would be invalid. But it would certainly be valid under the English law,* and also under the Mutazala interpretation of the Islâmic law.

It is a mistake to suppose that under the Mussulman law, a Mahomedan may marry only a woman belonging to the "revealed faiths." Marriages are allowed between Moslems and the *Ahl-ul-Hawâ* (free-thinkers), the Sabeans, as well as the Jews and the Christians. Mohammed's primary object was to keep idolatry out of the Islâmic body politic, and with this view he absolutely interdicted unions between Moslems and the pagan females belonging to the idolatrous tribes of Arabia.† In making this prohibition he was actuated by the same motives which led the more ancient Semitic legislator to prohibit all unions between the Israelites and the Phœnicians.

As the English law does not recognise polygamy, a Moslem cannot contract a second marriage contemporaneously with the first whilst temporarily residing in England, though such marriage may be considered legal according to the law of his domicile. If he does so, he becomes liable to a criminal indictment for bigamy.

But, can a Moslem once domiciled in England exercise the power on a temporary return to the *Bilâd-i-Islâm*? The French Courts have answered

* Dicey on Domicil, p. 224.

† Koran, chap. ii., v. 220.



the question in the negative, and it is not unlikely that the same view would be taken by the English Courts.

The Mussulman law gives to the parties in a marriage contract, subject to certain especial conditions, the power of dissolving the matrimonial tie by their own consent or free will. In such cases no proceeding in a court of justice is necessary, under the orthodox interpretation of the law.* Would a Mussulman, residing in England but domiciled in an Islâmic country, have the power of dissolving the status of marriage, without the intervention of the English Divorce Court? The general course of English decisions point by analogy to the conclusion that he *cannot* do so for any purposes of the English law; that is, the English law will neither recognise nor give effect to such a dissolution of the marriage tie.

As a general rule, jurisdiction in matters of divorce depends on the domicile of the husband at the time of the institution of the proceedings. In *Wilson v. Wilson*,† Lord Penzance said, "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting

* See the chapter on Divorce.

† L. R. 2 P. & D., p. 435.



matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws." The same view of the law was enunciated by Lord Justice Brett in *Niboyet v. Niboyet*,* who stated that "The domicile of the wife, so long as she is a wife, is the domicile which the husband selects for himself," and that "the only court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the status of either of such parties arising from their being married, on account of some act which by law is treated as a matrimonial offence, is a court of the country in which they are domiciled at the time of the institution of the suit."

The Mussulman law is in accord with the English law in its view of the conjugal domicile. In the case of a marriage, essentially monogamous in its nature and fulfilling the exact conditions laid down by the learned judge in the case of *Hyde v. Hyde*,† that is, "a voluntary union for life of one man and one woman to the exclusion of all others," there seems to be no principle of law which would lead the English

* 4 P. D., p. 1, 13. The correctness of the ruling of the majority of the Court in *Niboyet v. Niboyet* and *Sotomayor v. De Barros*, has been doubted by some of the leading English jurists.

† L. R. 1 P. & D., p. 130, *per* Lord Penzance.



Divorce Court to decline entertaining a suit for the dissolution of the matrimonial status upon grounds recognised by that court. An analytical consideration of the judgment in *Hyde v. Hyde* would point to the conclusion that Lord Penzance, in refusing to grant the relief prayed for in that case, did not expressly or even by implication decide that the English Divorce Court would, under no circumstances, entertain a suit for the dissolution of a *monogamous* marriage contracted in England by a person belonging to a persuasion other than the Christian, domiciled in England. When a Moslem, however, is only temporarily residing in England, how would the power of divorce which the Mahommedan law, under certain circumstances, vests in the parties be regulated? Supposing a Moslem husband wanted to dissolve the marriage tie on the ground of incompatibility of temper on the part of the wife, or supposing a wife wanted a divorce for ill-usage, would the parties be entitled to dissolve the status by mutual consent, as is permitted by the Mahommedan law, or would they be required to have a formal decree to that effect? If the marriage was celebrated in England, the English courts would recognise no divorce granted under the jurisdiction of a purely Mussulman court, unless such divorce was for a ground "recognised as such in this country, and the process of the foreign country was not resorted to for the collusive purpose of calling in the aid of its tribunals." * But if the marriage was celebrated in

* *Shaw v. Attorney-General*, L. R. 2 P. & D. 156.



the *Bilād-i-Islām*, and the parties were resident in England, even then the English Courts will not recognise a divorce not obtained through a validly constituted court of justice.* So that a Mahommedan residing in England cannot effect a dissolution of the status of the marriage of his own free will, though it may be valid in his own country.

If a Mussulman marry a Moslemah, the witnesses under the Mahommedan law ought to belong to the same faith; but when the parties to the marriage contract differ in faith, then it is not necessary that the *shāheds* (witnesses) should be the professors of Islām.

Under the Mahommedan law, as under the Scotch law, a marriage *per verba de præsenti* is sufficient to constitute a valid contract. But if the marriage is celebrated in England, it must be performed in the mode or according to the rites or ceremonies requisite by the English law to enter into a valid contract. The validity of the ceremony must, in fact, be regulated by the laws of England on the subject. The consent of parents or guardians, necessary under certain conditions to the validity of a Mahommedan marriage, is treated by the English law as part of the ceremony or form of the marriage.† For example, whilst a Hanafî or a Shiah male or female, if *sui juris*—that is, if over fifteen years of age and possessed of discretion—can contract himself or herself without the consent of

* See *Shaw v. Gould*, L. R. 3 H. L. p. 55.

† See *Sottomayor v. De Barros*, 3 P. D. pp. 1-7.



the guardian, a Shafēī girl, though "adult and discreet," can under no circumstance enter into a contract of marriage without such consent. If, however, she contracted herself in marriage in England against the wishes or without the consent of her guardian, it would be valid.

In Algeria it has been held that the Kazi is not bound to register a marriage between a Moslem and a non-Moslemah, but such marriage can be registered before the civil officer, who, in fact, is compelled by law to give effect to the wishes of the parties and make a record thereof in the registry office. Under the Mahommedan Marriage Registration Act which is in force in several parts of the Province of Bengal, it is optional with Mussulmans to register their marriages; but as the Kazis under the Act are especially appointed for the purpose of registering the marriages of the Mahommedans, they would be bound to do so if an application were made to them for the purpose. Supposing, therefore, that a Moslem either permanently domiciled in Bengal or only temporarily resident there, married a non-Moslem woman, and applied under the Marriage Registration Act to have the contract registered, the Kazi will have no option; though if there had been no such law in force, or if the office of Kazi had existed under the same conditions as under the purely Mahommedan *régime*, a refusal on his part would have been justifiable.

A curious point bearing on this part of the question came up for discussion before the Court of Algiers



on the 14th of October 1874. A Mussulman resident of Algeria married a Spanish lady named Marie Moll, who had embraced the faith of Mohammed. The marriage was contracted in the presence of the Kazi of Tlemcen. A child was born of this union, who was registered as the legitimate offspring of the husband Yusuff and the wife Marie Moll. Subsequently, on the death of her husband, Marie Moll, in her own right and that of her child, attempted to take possession of the deceased's estate, but was opposed by his brothers, who contested that the marriage contracted before the Kazi was invalid, inasmuch as though the lady had adopted the Mussulman faith, she continued to be a Spanish subject, and that therefore the ceremony ought to have taken place before the Spanish Consul or the French authorities. The court, consisting of three French judges and two Mussulman assessors, unanimously upheld the validity of the marriage, and declared that Marie Moll and her child were entitled under the Mahommedan law to the patrimony of Yusuff the deceased.*

A Mussulman, therefore, marrying a non-Moslemah in those parts of India where the Mahommedan Marriage Registration Act is in force, can do so either before the Kazi appointed under the Act, or privately before two witnesses belonging to his or her faith. If the woman is a foreigner, the contract may be entered into either before the consul of the state to which she is subject, or a registrar, or an ordinary

**II. Sautayra, p. 126.*



justice of the peace, or the Kazi. If the marriage takes place in England or any other European country, the formalities of the *lex loci contractus* with reference to a civil marriage must be complied with. Of course, no law would prevent a Mahommedan resident in England from marrying a Moslemah or a non-Moslemah according to the terms of the Mussulman law *per verba de præsenti*, but no court of law would take cognisance of it unless the requirements of the English law for the purpose of contracting a *valid civil marriage* were gone through.

A Mussulman domiciled in England cannot marry his deceased wife's sister; but if he were only temporarily residing in England, it is open to question whether he would be debarred from doing so. The American authorities certainly maintain that such a marriage would be valid.* But, according to the English jurists, it would appear that any marriage contracted in England within the degrees of consanguinity prohibited by the English law, would not be regarded as valid for any purpose by the English courts.†

The *patria potestas*, under the Mahommedan law, cannot be exercised by parents resident in England over their children, unless such powers were in conformity with the provisions of the English law.

* See Wharton, sec. 141.

† Dicey, however, seems to doubt the absolute correctness of this doctrine; p. 216.



NOTE I.

THE non-Moslem subjects of a Mahommedan government are called *zimmis*. They are liable to the *Jazia* or capitation tax, unlike the *Mustámins*, who are mere temporary sojourners in the *Bilád-i-Islám*, and who enter the Mussulman territories under the guarantee of international rights or especial quarter accorded on the frontier of the particular state.

NOTE II.

THE term *Bait-ul-Mál*, according to Ibráhím Halebî, is an abbreviation of *Bait-ul-Mál ul Mustemin*, literally treasury of the Mussulmans, or property of the Moslem community and public treasury.

The *Bait-ul-Mál* consists of four departments or divisions, viz. :—

- (1.) The chamber of alms, *bait-es-sadakdt.*
- (2.) The chamber of booty, *bait-ul-ganimet.*
- (3.) The chamber of the *haráj*, or the tax levied upon the *Rayahs*.

- (4.) The chamber of uninherited property.

The revenues of the chamber of alms accrue from :

- (a.) The fifth part deducted from the spoils of war (*Koran*, chap. viii. v. 42).
- (b.) The tithes paid by Moslems as masters of the domains granted to the conquerors at the time of the conquest, or left at that period to the old proprietors, newly converted.

- (c.) The taxes paid by right of *ushr* and *zekkdt.*

The property of the chamber of the *ganímet* is composed of :—

- (a.) Landed estates found without a master after a conquest, those taken from the enemy, and those of which the former proprietors remain as tenants.
- (b.) Mines, treasures, &c. &c.

The chamber of the *khardj* comprises the taxes levied by the state, such as the capitation tax levied on landed property, annual tributes, the indemnities of peace, &c.

The fourth chamber contains the goods left by persons dying without an heir, or by one who has disappeared from the country.

This property corresponds to some extent to that which in European countries accrues to the state by right of escheat, waif, &c. It is necessary, however, to bear in mind that it is generally but a sort of deposit in the *Bait-ul-Mdl* as unclaimed property, and it can never be reckoned as the legitimate possession of the treasury, though, in fact, it frequently remains permanently in its trust.

The revenues are employed in the following manner:—

- (1.) Those of the department of alms, for the exclusive benefit of poor and indigent Moslems, of orphans, widows, and travellers in distress.

For the enfranchisement of slaves, or for other acts of piety.

Finally, for the payment of salaries due to the collectors of tithes and other officers.

- (2.) Those of the department of *ganime* according to the disposition of the sovereign, who has the sole right to distribute the same; but here the Imâm is subject to rules which are impossible for him to violate, the first of which is that the booty must be employed in making public improvements and erecting new public buildings.
- (3.) Those of the department of *Khardj* for the benefit of the Mussulman community at large, and in defraying the expenses of the public service, in paying the salaries of Kâzis, muftis, and the pensions of soldiers.

These revenues are also employed in the purchase of arms, horses, and other necessities of war, as well as in the construction of mosques, bridges, roads, the cleansing of rivers, &c.

- (4.) Those of the department of unclaimed property, in the



relief of those who are sick and poverty-stricken, the burial of the poor, the support of foundlings, in affording succour to the indigent and the helpless ; for the construction of bridges, roads, and caravanserais when these have not been provided for by private endowments.

It will be seen, therefore, that the British Government in India has absolutely no right whatever to the property of the Mussulmans dying intestate in that country. The claims advanced on its behalf are consequently illegal according to the Shiah, as well as the Sunni, doctrine. The only ground on which the claim could be based was that the property would remain in trust in the hands of the Government for the benefit of the poor.

But the Mussulman law insists that such property should be applied exclusively to the benefit of the Moslem poor ; and the British Government does not make the smallest pretension to apply it in the way the Mahomedan law intends.



CHAPTER III.

THE STATUS OF LEGITIMACY.

UNDER the Mahommedan, as in all civilised systems of law, "the child follows the bed," that is, the paternity of a child born in lawful wedlock is presumed to be in the husband of the mother without any acknowledgment or affirmation of parentage on his part, and such child follows the status of the father.

According to the Sunni schools, the presumption of legitimacy is so strong, that in cases where a child is born six months from the date of marriage, and within ten months after dissolution of the marital contract, either by the death of the husband or by divorce, a simple denial of paternity on the part of the husband would not take away the status of legitimacy from the child.

M. Sautayra says, on this subject, that "the legal presumption is so strong in the case of a formally and legally married wife, that it produces the effect of attaching legitimacy to the children born during



the continuance of the marriage, even where the parties declare that the paternity should be *ascribed* to a stranger, unless the denial is effectuated by *la'ân*, a formal charge of adultery by the husband against the wife."

The English law on the subject of legitimacy is analogous to the Mussulman law.* According to the English law, a child born anywhere in lawful wedlock is legitimate, unless there is evidence of non-access or the like. But the English law, taken *per se*, does not recognise the legality of polygamous unions; and there is no authority to show what the status of the issue of such unions in the case of Mussulman parents would be, and whether or not it would be modified by the general rule under which the validity of marriages depends upon the law of the parents' domicile. For example, if a Mussulman, domiciled in Algeria, where the Shâfeî branch of the Sunni law is in force, married two wives, would the children of the second marriage, as seems just, be treated as legitimate, albeit the English law does not recognise a second union contemporaneously with the first as lawful or valid? And, granting that they would, if a Moslem, domiciled in England, contracted a second marriage in Algeria, would the children of such marriage be legitimate or illegitimate according to English law?†

* Story, ss. 879, *et seq.*

† In *Hyde v. Hyde*, L. R. 1 P. & D., p. 130, it was decided that a Mormon marriage would not give the alleged husband a right to obtain a decree of dissolution of marriage for adultery. In *Brook v. Brook*, 9 H. of L., p. 193, it was laid down that persons cannot



In order to give rise to the presumption of legitimacy in favour of the child, it is necessary, under the Mahommedan law, that there should have been access on the husband's part. If a child is born under circumstances which preclude the possibility of such access, then, according to both the Sunnis and the Shiahhs, the presumption of law is rebutted.

In the same way, if a child is born *within* six months after marriage, no affiliation would take place. The Sunnis, however, hold that if the husband claimed the child as his own, *conceived* in wedlock, and not as the fruit of illicit intercourse, *ascription* would be made to him.* The Shiahhs, on the other hand, declare that under no circumstance can a child born within six months from the date of *consummation* of marriage, or from the last time the parties lived together as husband and wife, be considered as the legitimate offspring of the husband.† But they agree with the Sunnis in holding that when the child is born under circumstances which give rise to the natural presumption that it is his offspring, nothing short of the proceeding by *laân* can take the status of legitimacy from it.

The shortest period of gestation, according to all evade the law of their own domicile by a marriage in another country. It is submitted, however, that neither of these principles should be considered as affecting the legitimacy of children of Mussulman parents married according to their own law, whose conduct has not been evasive.

* 1 "Fatawa-i-Alamgiri," p. 727; Kanz-ud-Dakâik.

† "Sharâya-ul-Islâm," p. 300 "Jamâ-ush-Shattât."



the schools, is six months. This period is fixed in the Koran, and consequently there is little room for divergence among the jurists.* But they differ considerably as to the longest period of pregnancy. Among the Hanafis, it was usual to regard two years as the longest term of gestation.† This was, at least, the view enunciated by Abû Hanîfa and his two disciples, upon the authority of a tradition reported by Ayesha. On the other hand, the Shâfeîs extend the term to four years, and the Mâlikîs to five, and sometimes to seven years.‡ The Imâms Shâfeî and Mâlik based their opinions on the legendary birth of *Buer-asṣ*, surnamed *Zuhâk Tâzi*, who is said to have been born in the fourth year of his conception, like *Ibn Rebia* and *Ibn Ajlân*.§ The Shiahs, upon the basis of a decision pronounced by Ali during his Caliphate, recognise ten lunar months as the longest period of gestation.||

Mr. Baillie thinks that the ancient Sunni doctors, in laying down such long periods, had in view those abnormal conditions which "sometimes perplex the most skilful of the medical faculty in Europe." D'Ohsson and Sautayra, on the contrary, are of opinion that the old jurisconsults of the Sunni schools "were actuated by a sentiment of humanity, and not

* "Koran," chap. xlv. v. 14.

† "Durr-ul-Mukhtâr," p. 282; 1 "Fatâwa-i-Kâzi Khân," p. 422.

‡ "Durr-ul-Mukhtâr," p. 282; 1 "Fatâwa-i-Kâzi Khân," p. 422.

§ The author of the "Sharîfiyah" ridicules these legendary stories. See Baillie's "Mahommedan Law," p. 157.

|| "Jâma-ush-Shattât; Mafâtih;" "Irshad-i-Allâmah."



by any indifference to the laws of nature, their chief desire being to prevent an abuse of the provisions of the law regarding divorce and the disavowal of children."§

Notwithstanding that the Shâfeî and Mâlikî doctrines are in force in Algeria, the Algerian Kazîs have adopted the same view as D'Ohsson, and "in their decisions seem invariably to have held that ten months was the maximum term recognised by law." The Court of Algiers, by several decrees, dated the 16th of April 1861, the 13th of November 1861, and the 1st of September 1868 respectively, has supported and confirmed the Kazîs' decisions*; and there is no doubt that the general *consensus* of Mahommedan doctors points to ten months as the longest period of pregnancy which can be recognised by any court of justice.

A child, therefore, born within the period indicated and whilst the married parties were living together as husband and wife, is *affiliated* without any express acknowledgment on the part of the father. But a husband can disclaim a child born in wedlock, and within the period recognised by law, if cohabitation was impossible, whether the impossibility arose from disease, physical incapacity, or want of access.† Ac-

§ See "Tableau Gen. de l'Empire Ottoman," vol. iii. pp. 102, 103. Under the Roman law, the longest period of gestation was ten months. Under the Code Napoléon (Art. 312), the shortest term of pregnancy is one hundred and eighty days, and the longest three hundred days.

* Sautayra.

† "Sharâya-ul-Islâm," p. 300; "Jâma-ush-Shattât"; 1 "Fatâwa-i-Alamgîrî," p. 722.



According to the *Fatâwa-i-Alamgîrî*, a disavowal on these grounds requires the performance of the ceremonies which surround the proceeding by *laân*. Sautayra, however, is of opinion that a disavowal of paternity should be enforced by a simple judicial action instituted by the husband or his representatives against the wife or those who represent the interests of the child, and that an action instituted for the purpose of establishing illegitimacy is subject to the ordinary rules of procedure, and does not require the formalities of the *laân*. In the Indian courts of justice the procedure would probably be the same as in declaratory suits, though before purely Mahomedan tribunals the process of obtaining a declaration of illegitimacy as contemplated in the Mussulman law, would be more simple. The Indian Law Reports furnish no instance of a suit by a husband questioning the legitimacy of a child borne by his wife in wedlock. The cases in which the status of legitimacy has been discussed have arisen chiefly on the suit of a child, after the decease of the alleged father, to establish its right of inheritance to the paternal estate.

But even in these cases the main question has proceeded on the basis of the wife's position, whether she was legally married or not.* The principles formulated in the decisions of the Judicial Committee of the Privy Council, contain important and explicit declarations regarding the unwillingness of the Mussulman law to bastardise children, when the surrounding

* Comp. Dicey, "The Law of Domicil," p. 181.



circumstances lead to an irrebuttable inference that the child was the offspring of the father, or that he acknowledged and recognised it as such during his lifetime.*

Upon a careful analysis of the cases which turn upon the legitimacy of a child, it will be found that the matter in dispute invariably turns either upon the validity of the marriage of the parents, or on the proof of the fact that the child was *born in wedlock*.

Under the Jewish law, the right of disavowal possessed by the husband is absolute.†

The Code Civil of France also permits a disavowal on the ground of the physical impossibility of cohabitation.‡ The Mussulman law, it will be seen, is analogous to the Roman and the French law in recognising certain specific grounds as justifying the disavowal of a child born in lawful wedlock, those grounds being physical impossibility and want of access.

But the Mussulman law goes further and holds that the right of disavowal is a *terminable* right. It ceases on the occurrence of certain contingencies which the law always keeps in view.

If the father has taken part in the customary cere-

* *Khaja Hedayat Oollah v. Raijan Khanum*, 3 "Moore's Indian Appeals," p. 295; *Khajurunnessa v. Roushan Jehan*, 2 "Ind. L. R. Cal. Series, P. C." p. 189. In the latter case their Lordships used the following words in dealing with the question of the child's legitimacy, as well as the position of the mother: "Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises that the son's mother was the father's wife."

† "Code Rabbinique" (Ebn-Haezer), vol. ii. p. 63.

‡ Art, 312-318.

monies* which in a Mussulman family attend a birth, or has, by his conduct, led people to believe that he considered the child his legitimate offspring, or has accepted their formal congratulations, then his right to deny its legitimacy falls to the ground,† unless he can prove that at the time he was unaware of his wife's infidelity.

If the husband is on the spot, and is aware of his wife's confinement, the Mâlikîs allow him two days, and the Hanafîs a week, for the purpose of disavowal.‡ Among the Hanafîs the lapse of a week implies the performance of all the ceremonies attending the birth, and therefore, should no denial take place within that

* Such as the *akika*, &c.

† 1 "Fatâwa-i-Alamgîrî," p. 703; "Sharâya," p. 346.

و اذا نفى الرجل ولد امرأته عقيب الولادة اوفي ل حال التي
 يقبل التهنية ويبتاع آلة الولادة صح نفية ولاعن به وان
 نفاه بعد ذلك لاعن وبشيت النسب ولو كان غائبا عن
 امراته ولم يعلم بالولادة حتي قدم له النفي عند ابي حنيفة
 في مقدار ما يقبل التهنية وقالا في مقدار مدة النفاص بعد
 القدوم *

"When a man has denied the child of his wife after its birth, or at the time when he is accepting congratulations, or when the necessities" (connected) "with the birth are being purchased, his denial is valid, and the *laân* should be administered to him; but if he should not deny it until after this, though the *laân* would be still administered to him, the *nasab* (of the child) would be established (in him). But if he were absent from his wife, and not aware of the child's birth until informed of it, he would have, according to Abû Hanîfa, as much time for denial as is occupied with congratulations; or, according to the two (disciples), the whole period of the *nifâs* after receiving the intelligence."—"Fatâwa."

‡ "Tab. Gen. de l'Empire Ottoman," vol. iii. p. 103.



period, the presumption, of course, is that the husband has no ground to question the legitimacy of the child.

If the husband is absent, the law gives him as much time as would be usually occupied with congratulations, from the receipt of the information concerning his wife's confinement.

Among the Shiahs the term allowed to the husband for the purpose of disavowing a child is forty days (the whole period of the *nifās*), whether the husband is on the spot or is absent from his wife. In the latter case, the period commences from the moment he receives the information of the child's birth.*

According to the law of England, of the Northern States of America, and of all countries where the English common law is in force, antenuptial children or children born before the marriage of the parents, cannot be legitimated by the subsequent marriage of the parents. According to the Scotch law, and that of most countries which have adopted, or have been influenced by, the Roman law, as the law of France, such children are legitimated by the subsequent marriage of the parents. These systems of law, in short, recognise and allow what is technically called *legitimo per subsequens matrimonium*.

The Mahommedan law on this point bears the closest analogy to the English law.* Like the English common law, it does not recognise the legitimation of antenuptial children by the subsequent marriage

* "Tab. Gen. de l'Empire Ottoman," vol. iii. p. 103; "Jâma-ush-Shattât."



of the parents ; but it goes further than the English law in refusing to attach the status of legitimacy to any children not *conceived*, though born, in wedlock. Under the English law, a child *born in lawful wedlock* is legitimate, though its conception may have taken place before the actual marriage. The Mahommedan law, on the contrary, insists that the intercourse between the parents of which the child is the fruit, should, in order to render him *legitimate*, take place under a lawful contract. "If a man," says the Fatawa-i-Alamgîrî, "should commit *zina** with a woman, and she should become pregnant, and he should then marry her, and she be delivered of a child *within* six months of the marriage, its paternity from him would not be established, unless he should claim it, and should not say, 'It is of fornication ;' but if he should say, 'It is mine by fornication,' parentage would not be established."† So also the Hedâyah, "If a man marry a woman, and she bring forth a child *within* less than six months from the date of marriage, the parentage of the child is not established in the husband, as pregnancy in that case appears to have existed previous to the marriage, and consequently cannot be derived from him."‡

The (Shiah) "Sharâya-ul-Islâm" and "Jâma-ush-Shattât" declare that "if a man should have carnal connection with a woman, get her with child, and then

* Fornication.

† 1 "Fatawa-i-Alamgîrî," p. 727 ; 1 "Fatawa-i-Kâzi Khân," p. 421.

‡ 1 "Hed.," p. 382



marry her, there would be no *nasab* between him and the child.”*

Two points deserve attention in the dicta given above. Not only is there a great divergence between the Sunni and the Shiah law, but a certain amount of difference is observable between the views entertained by the “Fatâwa” and the “Hedâyah,” though on careful consideration it will be seen that the difference is more apparent than real. The Shiah law excludes all possibility of a child being affiliated to the father if the conception takes place *before* marriage. The “Fatâwa” holds that when the conception takes place before marriage, and the child is born *within* six months of that time, it is not legitimate; by implication, therefore, it leads to the conclusion that in the converse case, that is, when it is conceived before marriage, but is born *after* six months, it would be legitimate. It thus gives the benefit of the doubt to the child. The “Hedâyah” apparently proceeds on a different basis, but in its result it coincides with the ruling of the “Fatâwa.” It seems to hold that as the shortest period of gestation is six months, if a child is born *within* that time, it cannot be supposed to be the child of the husband, and its parentage must be ascribed to another person, unless the husband claims it as his own.

As a general rule, therefore, it may be said that the Shiah is stricter than the Sunni law, for whilst the

* “Sharâya,” p. 300.



latter recognises as legitimate children born six months after marriage, even though conception may have taken place before, the Shiah law attaches the status of legitimacy only to such children as are *actually conceived* in wedlock.*

In *Ahmad Hoosain Khan v. Hyder Hoosain Khan*,† the Judicial Committee of the Privy Council expressly laid down the principle that under the Mahommedan law “the presumption of legitimacy from marriage follows the bed and is not antedated by relation.” This principle, however, which only proves what has already been stated, namely, that the Mussulman law does not recognise the doctrine of *legitimatio per subsequens matrimonium*, must be taken with the limitations mentioned.

The children of *semblable* contracts of marriage are legitimate under the Mahommedan law.

Under the Code Napoléon, when a contract of marriage is entered into in good faith, the children of such marriage are legitimate in the eye of the law, though the union may be declared null and void subsequently.‡

“An invalid marriage,” says the “Fatawa-i-Alam-giri,” “is like a valid marriage in some of its effects, one of which is the establishment of parentage.”§

* “Jāma-ush-Shattāt”; “Mafātih”; “Irshād-i-Allāmah”; “Sharāya.”

† 11 “Moore’s Indian Appeals,” p. 94.

‡ Arts. 201 and 202.

§ 1 “Fatawa-i-Alamgiri,” p. 722.



The Shiah law is more explicit. *Nasab*, according to the jurists of this school, is established by a *valid* marriage or by a *semblable* contract of marriage. If a man should enter in good faith into a contract of marriage which turns out to be invalid, or if a man cohabits with a woman, erroneously, but *bonâ fide*, believing her to be his wife, the offspring of such marriage or such intercourse would be legitimate in the eye of the law.* Similarly would *nasab* be established though the union was *ab initio* null and void. For example, if a man married a woman who was forbidden to him, or with whom marriage was unlawful, either *radically*, that is, from the relationship of blood existing between the parties, or by some incidental circumstance—such as fosterage, matrimonial affinity, or any other cause—the issue of such an union would be legitimate, if the marriage was contracted in error or the parties were not aware of the *hurmat* (illegality).† If a man married by a *pure mistake* a woman within the prohibited degrees of consanguinity, such marriage would be *radically* illegal, but the issue of the union would *not* be illegitimate. Abû Hanîfa agrees with the Shiah doctors; whilst Abû Yusuff and Mohammed, whose views have been adopted by the great jurist Abu'l Lais, and are in force among the Indian Hanafis, hold a contrary opinion. According to them, the children of a *radically* illegal union

* "Irshâd-i-Allâmah"; "Sharâya-ul-Islâm," p. 301.

† "Jâma-ush-Shattât"; "Sharâya," p. 457.



would be illegitimate, whether the marriage was contracted in error or not.*

When a woman, whose former husband is alive, enters into a second contract of marriage under the *bonâ fide* belief that the husband is dead, and the man whom she marries labours under the same impression, a child born of such marriage is legitimate according to the Shiahs, and illegitimate according to the Hanafîs. But if the parties were to marry with the knowledge of the fact that the woman's first husband was alive, the intercourse being *ab initio* adulterous, the child would have no *nasab* with his father, according to either school.

Under the Shiah law, "a child of fornication" (*walad-uz-zinâ*) owns no *descent* to either of its parents. It is regarded as *nullius filius*; "so neither the man who has unlawfully begotten, nor the woman who has unlawfully borne, the child, nor any of their relations, can inherit from such child; nor has the child any title to inherit from them."

The principles of the Shiah law of legitimacy were discussed at some length in the case of *Musst Saheb-zâdi Begam v. Mirza Himmât Bahâdur*, which came before the High Court of Calcutta.† In this case it appeared that a Hindoo Rajah, called Modenarain Singh, had contracted an alliance with a Shiah woman of the name of Burâtî Begam.‡ There were several

* 2 "Fatawa-i-Alamgîrî," p. 210.

† 12 "Sutherland's Weekly Reporter," p. 512; 4 Beng. L. R., A. C. 103.

‡ All unions between *Moslem females* and *non-Moslem males* are illegal under the Mahommedan law.



children born of this union, all of whom were brought up in the Mahommedan faith and the Shiah communion. Upon the decease of one of the sons, leaving behind him a brother and a sister and the wife, Sahebzâdi Begam, the question was raised whether the former were entitled to any interest in the estate of the deceased. It was decided that as, under the Shiah law, there was no *nasab* between them and the proprietor, they had no heritable right in his property.

Whilst the offspring of illicit intercourse—a *walad-uz-zinâ*—owns no relationship or *nasab* under the Shiah law to either of its parents, the rule is otherwise with reference to the “child of imprecation”—*walad-ul-malâinah*, the child whose affiliation has been “cut off” by the proceeding of *laân*.

“The child of imprecation is cut off from the man, not from the woman; so that the mother and those related through her retain their right of inheritance reciprocally.”* But if the father were to make a retraction of the *laân*, the *nasab* or the status of legitimacy will be re-established so far as to restore to the child the right of inheritance to its father, but not *vice versâ*,† that is, the father cannot, by a retraction, recover his right of inheritance to any property that may be left by the child.

Under the Sunni law there is no difference in the status of a *walad-uz-zinâ* and a *walad-ul-malâinah*—a

* “Irshâd”; “Jâma-ush-Shattât”; “Sharâya,” p. 349.

† *Ibid.*

“child of fornication” and a “child of imprecation.” Both have a *nasab* with their mother and persons connected with them through their mother, and consequently they can inherit from her and all relations connected through her, just as the latter can inherit from them.* For example, if, in the case of *Musst Sahebzâdi Begam v. Mirza Himmat Bahâdur*, the parties had been Sunnis instead of Shiahs, the brother and sister would undoubtedly have taken a share in the inheritance of their deceased brother.

When the parties are married, and the marriage is a matter of notoriety and capable of distinct proof, any dispute as to the status of the children resolves itself into a mere question of whether the children were *conceived and born* in lawful wedlock or not. But there may be cases in which the marriage is not capable of being easily proved. It may have been contracted in a distant country or under circumstances which preclude the possibility of securing documentary or oral testimony as to the *factum* of the marriage. In these cases the Mahommedan law presumes a legal marriage from continued cohabitation and the acknowledged position of the parties as husband and wife, provided there is no insurmountable obstacle to such a presumption, and provided the relationship existing between the parties was not “a mere casual concubinage,” but was permanent in its character,

* “Kanz-ud-Dakâik” (Pers. Trans.); 6 “Fatawa-i-Alamgiri,” p. 629; Sicé, “Lois Mussulmane.”



justifying the inference that they were lawfully married.*

For example, if a woman, married to a man from whom she is not divorced, contracts a union with a second person, and lives with him continuously, such continuous cohabitation in the face of the legal bar to their lawful union, will not give rise to the presumption of a legal marriage; or, if the woman were related to the man within the prohibited degrees, their living together as husband and wife will not lead to the presumption of a lawful marriage.

If, however, there were no such bar to their being lawfully married, and the connection was not in the nature of a casual concubinage, the law would presume from continuous cohabitation that it was a valid marriage, and would attach the status of legitimacy to the offspring of the connection. Should continuous relationship give rise to the presumption of a marriage, the child of such marriage can be legitimated only by the father's acknowledgment of it, *express or implied*. It is not necessary that he should acknowledge the child *expressly*. If it can be inferred from his conduct towards and his treatment of the child, that he acknowledged it to be his, the law will attach the status of legitimacy to it.†

* *Baker Hussain Khan v. Shurfunnissa Begum*, 8 "Moore's Indian Appeals," p. 159.

† 11 "Moore's Indian Appeals," p. 94; 8 "Moore's Indian Appeals," p. 159; *Musst Husnoo v. Musst Wahedunnissa*, Agra, Sudder Dew. Ad. Decisions for 1864, p. 380.



NOTE 'I.

ABŪ HANĪFA thinks that "wherever there is a subsisting contract of marriage, the children conceived under it must always be held to be the offspring of the husband." The consequence deduced from this doctrine is, that even where there exists a radical defect in the union, it would not interfere with the legitimacy of the children. For example, when the parties are related to each other within the prohibited degrees and yet married to each other, the offspring of the union would nevertheless be considered legitimate. Mr. Baillie thinks that the compilers of the "*Fatāwa-i-Alamgīrī*," ignoring the views of Abū Yūsuf and Mohammed, who hold a contrary opinion, have adopted that of Abū Hanīfa. I am inclined to think Mr. Baillie is wrong in this conclusion. There is nothing, as far as I can see, in the "*Fatāwa*" which would lead to such an inference. The passage upon which he bases his argument has no connection with the subject of marriage; and analogy shows conclusively that the Indian Hanafī lawyers are in accord with the western Moslem jurists on this point.



CHAPTER IV.

ADOPTION, FILIATION, AND THE DOCTRINE OF ACKNOWLEDGMENT.

ADOPTION in the sense in which it is understood by the Hindoos, and as it was practised among the Romans, is not recognised by the Mahomedan law. Among the Romans, as among the Hindoos of the present day, it was intimately connected with religious ideas, "having relation to the repose of the souls of the departed and the preservation of the household divinities." It existed also among the pre-Islâmic Arabs, and no doubt had a similar origin.*

The odious name attached by the pagan Arabs to any person leaving no male issue behind him† is sufficient evidence of the importance which the custom of adoption possessed in their eyes.

The Prophet appears to have recognised the custom

* Caussin de Perceval, "Histoire des Arabes," p. 364.

† *El-abtar*, *lit.* tailless.



at the time he adopted Zaid, the son of Hâris. Later, when he had weaned the idolatrous tribes from the revolting practices to which they were addicted, and had given them loftier ideas of domestic relationship, he explained in fuller terms, that adoption similar to what was practised in the "days of ignorance" created no such tie between the *adopted* and the *adopting* as resulted from blood relationship.*

The Mussulman law accordingly does not recognise the validity of any mode of *filiation* where the parentage of the person adopted is *known* to belong to a person other than the adopting father.

The only form of filiation which is recognised by the Mahommedan law is the one which is created by *Ikrâr* or "acknowledgment." The father alone has the right to establish the relationship, to the total exclusion of the mother and other relations.

Such acknowledgment may be either *express* or *implied*; it may be made in express terms, or may be implied from the father's conduct towards, and his continued treatment of, the child as his own child.† But in order to render the acknowledgment valid and effectual in law, three conditions must be fulfilled, viz. :—

(1.) The acknowledgor and the acknowledged must

* "Koran," chap. xxxiii.; "Tabari" (Zotenberg's Translation), vol. iii. p. 58.

† 1 "Fatawa-i-Alamgîrî," p. 703; 2 "Sharh-i-Vikâyah," p. 438; Hedâyah," bk. xxv, chap. iii.; "Sharâya-ul-Islâm," p. 376; 3 "Moore's Indian Appeals," p. 245; 5 "Sutherland's Weekly Reporter," p. 132.



be of such ages respectively as would admit of the possibility of their standing in the relation of parent and child to each other. For example, a man "cannot establish the relationship of father and son between himself and another unless he is at least twelve and a half years older than the son he intends to adopt or acknowledge."

- (2.) The person acknowledged must be of *unknown* descent. If the parentage is known, no *ascription* can take place to the acknowledged.
- (3.) The acknowledged must believe himself *to be the acknowledged's child*, or, at all events, assent to the fact.*

The "Hedâyah," with reference to this latter condition, says, "It is also a condition that the boy verify the acknowledgment, because he is considered to be his own master, as he is supposed to be able to give an account of himself. *It would be otherwise if the child could not explain his condition.*"†

An infant who is too young to understand what the relationship implies, or to give an account of himself, is not required to agree to the acknowledgment, nor is his assent a condition precedent to the validity of an acknowledgment, as it is in the case of an adult.

* There is no difference between the Shiahs and the Sunnis on this point.—"Sharâya-ul-Islâm," p. 376.

† 3 "Hed.," bk. xxv. chap. iii. pp. 168, 169. The rule applies to both male and female children.



The "Jowharat-un-Nâyirèh" says, "The assent is required only from a young person who is possessed of discretion and is able to give an account of himself . . . it is not necessary in the case of an infant."*

The "Jâma-ush-Shattât" says, "No regard is paid to the assent of a young child;" and the "Sharâya" adds, "If an infant is acknowledged and afterwards, on attaining his majority, he denies the paternity, such denial is of no effect."†

An acknowledgment of paternity produces all the legal effects of natural paternity; and it vests in the child the right of inheriting from the acknowledged. An acknowledgment of parentage may be considered, therefore, as analogous, in certain of its legal effects under the Mahommedan law, to the doctrine of *legitimation per subsequens matrimonium*. But there is this marked difference between the two doctrines, that whereas *acknowledgment* presumes a *prior marriage*, the *legitimation* of antenuptial children by a subsequent marriage proceeds upon a totally different hypothesis. As far, however, as the status of legitimacy is concerned, both doctrines lead to the same result—of legitimating the issue of an invalid connection, or of a marriage of which there is no proof that it was validly contracted. The acknowledgment of a child by a *married* woman

* See also Shama Churn Sircar's "Lectures," vol. i. p. 378.

† "Sharâya-ul-Islâm," p. 376; "Irshâd-i-Allâmah"; "Jâma-ush-Shattât."



is *not valid*, inasmuch as it affects another person, viz. the husband, unless it is confirmed by the husband's own declaration. For example, if Hind, the wife of Zaid, were to say that Amr, a person of unknown parentage, was her son, her statement would have no legal effect, for, were it otherwise, liability might be attached to the husband, prejudicially perhaps, through his wife's statement. If, however, he were to confirm her acknowledgment, it would be valid, and the son Amr would acquire the status of legitimacy.

This rule is intended to guard against the imposition of fictitious children as the offspring of a particular person; and with this object it is also laid down that maternity can be established by the testimony of the midwife, when it is necessary to ascertain that the child with reference to whom a claim is advanced, "is the identical child which the said woman brought forth."*

It will be seen, therefore, that a woman who is married, or one who is observing the *iddat* or probation, during which she cannot contract a second marriage, is precluded from acknowledging or adopting a child, unless her acknowledgment is confirmed by her husband, or the child is proved, by the testimony of competent witnesses, to be her own.

"A woman's acknowledgment," says the "Inâyah," "with respect to a son, is not valid, inasmuch as the parentage affects another, namely, the husband, unless

* 3 "Hed.," bk. xxiv. chap. v.



her statement is confirmed by him (as the right appertains to him), or the birth be proved by the testimony of a competent woman, namely, the midwife.”*

But supposing the husband be dead, the mother's declaration as to the legitimacy of a posthumous child born during the *iddat*, or longest period of gestation recognised by law, is of effect only if unopposed by other heirs to the property.

If the actual birth of the child be not in dispute, if there be no question as to its legitimacy, if the mother's statement that the child born to her is her deceased husband's be assented to, expressly or impliedly, by his heirs, “the child should be held to be descended from the husband” . . . “though no person bears evidence to the birth.”†

Such child would succeed, of course, to its deceased father. But “a question may arise whether the parentage so established would affect the rights of others than those heirs” who acknowledged him to be the child of the deceased. Would their acknowledgment, in fact, establish conclusively the legitimacy of the child and impart to its status the character of a right *in rem*? The opinion on this point seems to be, that, if there be no doubt as to the credibility of the acknowledging heirs, if their acknowledgment cannot be impeached in any way, then “the parentage which

* 1 “*Ināyah*,” p. 215; 1 “*Shama Churn Sircar's “Mahommedan Law,”* p. 380.

† 1 “*Hed.*,” p. 381.



is established affects others as well as themselves,"* and is conclusive against all the world.†

Under the Shiah law also, a married woman can create the relationship of mother and child between herself and another person, if all the requisite conditions are complied with, and her declaration is confirmed by her husband. The Shiah law coincides with the Sunni doctrines regarding the conditions necessary to constitute a valid acknowledgment of a child. It requires also that, in the first place, the child acknowledged must be of unknown descent or parentage. If it should be generally known that the *acknowledgor* and the *acknowledged* are not related to each other by the tie which they allege, or if it should be known that the parties belong to different families, or that the child has a *known* father or mother other than the *acknowledgor*, the acknowledgment is not valid.

In the second place, there should be such a difference of years between the parties as to render it pos-

* 1 "Hed.," Eng. Transl., p. 381.

† Abū Hanīfa says that if a woman, separated from her husband, be delivered of a child during the period of probation, "the parentage is not established in the husband," "unless the birth be proved by the evidence of two male witnesses, or one male and two female witnesses." The author of the "Hedāyah," however, explains this by saying that this rule applies to a case "where there is no apparent pregnancy." As a matter of fact, however, it would appear to be settled now that the evidence of the midwife is sufficient in law to establish the actual birth. Comp. Abū Hanīfa's views with the Shiah doctrines.



sible that they could stand towards each other in the acknowledged relationship. No particular limit of age is specified in the Shiah law, the law of nature furnishing the guiding principle in such cases. Nor is the acknowledgment of a child by a man valid when he could not possibly have had access to its mother during the age of such child.*

In the third place, there should be no dispute as to the parentage of the child, that is, no other person should claim the child to be his own; in which case, the acknowledgment is not valid without proof.†

An acknowledgment, therefore, of a child by a married woman is valid in law, provided her husband confirms her statement and the requisite conditions, as stated above, are complied with.

But where the husband is dead, and the widow is delivered of a child, the question seems to be involved in great doubt. If there be no dispute as to the birth of the child, the parentage would, of course, be ascribed to the husband; but when the child's legitimacy is questioned, difficulties arise which cannot be easily solved by a literal interpretation of the Shiah doctrines. Recourse must then be had to equity and to a liberal construction of the letter of the law as adopted by the more modern jurists of the Shiah school in Persia.‡

* "Sharâya," p. 376; "Irshâd-i-Allâmah"; see 4 Beng. L. R., A. C. 55.

† "Jâma-ush-Shattât."

‡ Compare most of the dicta in the "Jâma-ush-Shattât."



For example, the Shiah law declares that descent or *nasab* cannot be established except by the testimony of two *just* men;* “nor can it be established by the testimony of two profligates, even though they be heirs,”† except in so far as the “profligates” themselves are concerned. The *raison d'être* of this restriction is perfectly clear. It is laid down with the object of preventing the perpetration of fraud by the collusion of unscrupulous heirs. This is shown in the following rule: “If two brothers, being *just* persons, should testify to another being a son of their deceased brother, his *nasab* or descent, and his right to the inheritance of the deceased, would be established; but such right would create no reciprocity.”‡ The son so acknowledged would inherit *from the deceased*, but neither would he inherit from the deceased's brothers, nor would they from him. Even if two “profligate”§ brothers acknowledged a certain child to be their deceased brother's offspring, such child would succeed to his inheritance in preference to them.

It will be seen, therefore, that where the legitimacy of a posthumous child is questioned, the Shiah law requires more ample guarantees than the Hanafî law against fraud and collusion: As long as this is kept in view, and the conception and birth of the

* *Ādil*, i.e. a man leading an honest life, never accused nor convicted of any serious civil or moral offence.

† “*Sharāya*,” p. 377.

‡ Men whose evidence is impeachable.



child is satisfactorily proved, the technicalities of the Shiah law may safely be disregarded.

Under the Shiah law, if a deceased person leave a widow and brothers, and the widow acknowledge a child to be the child of her deceased husband, her share in the estate of the husband is reduced from one-fourth to one-eighth; the *acknowledged* child takes the other eighth, even when the descent is disputed by the deceased's brothers. When the descent is established in a court of justice or assented to by the brothers, the child takes the entire residue.

An unmarried woman, or a woman who has no husband, can create the relationship of mother and child between herself and another person by a simple *Ikrâr* or acknowledgment, provided the other conditions are fulfilled.

Acknowledgment also establishes certain other relationships besides parentage; and in these cases there is no distinction between an acknowledgment made by a man and that made by a woman. For example, a person may acknowledge another as his or her father or mother, or husband or wife, or brother or aunt; and such acknowledgment, if *assented* to or confirmed by the acknowledged, whether during the lifetime of the acknowledgor or after his or her decease, would constitute a valid relationship, in so far as the parties themselves are concerned.*

In the case of these acknowledgments, *express* assent

* 3 "Hed.," bk. xxv. chap. iii.



on the part of the acknowledged is necessary to constitute a valid relationship; when there is no such assent proved, the acknowledgment falls to the ground and creates no right on either side.

In these cases, also, the parties must be of unknown descent in order to stand to each other in the alleged relationship without disregard to obvious facts.*

"The descent of any other than a child cannot be established," says the "Sharâya," "without the assent or concurrence of the person acknowledged;"† and the right of inheritance created by such an acknowledgment is restricted to the acknowledging parties themselves and does not extend to their heirs. It is otherwise in the case of parent and child. If one person acknowledges himself the father of another, who, if able to do so, "verifies and avows the filial tie, these are not only by law the heirs of each other but this right extends to all the heirs or descendants of both." But if "a person declare another to be his brother, who, on his part avows the relationship, and they are not known to be the contrary, the right of inheritance is established between them as to each other, but does not extend to the brothers of either nor to any other relation."‡

If the acknowledgor has any *known* heir his acknow-

* "Sharâya," p. 460; "Jâma-ush-Shattât."

† "Sharâya," p. 376.

‡ Same under the Hānafi law, 3 "Hed.," p. 169; Collateral adoption is also, allowed under the Mālikī law, 1 Sautayra, p. 339.



ledgment of *nasab* in favour of another does not exclude the former from their natural right of inheritance, or vest any right in the acknowledged.* The "Sharāya" lays down as a general rule that in such a case, "his acknowledgment of *nasab* is not to be accepted."

An acknowledgment can take place only when the person acknowledging possesses the legal capacity of entering into a valid contract. The person must be adult, sane, and free. An acknowledgment made by an infant (under the Mahommedan law, one who has not attained the age of puberty) or by a person who is in *duress*, or who is *non compos mentis*, is absolutely invalid. An insane person, however, may be *acknowledged* without regard to his or her assent, in the same way as an infant.†

Regard must always be paid to the fact that when an acknowledgment is in favour of a child, or an insane person, who cannot assent to the relationship so created, the interest of such child or such person should not in any way be affected.

Under the Shiah law, if a child of unknown paternity (*nasab*) should die without leaving any heir except the Imâm, and some person were to make a *declaration* to the effect that the deceased was his child, the inheritance of such child would go to the declarant, instead of to the Imâm. Foundlings (*lakit*)

* 3 "Heḍ," p. 173; 1 "Fatāwa-i-Kāzi Khan," p. 422; "Sharāya," p. 376; Comp. 13 Beng. L. R. P. C. 182.

† "Sharāya," p. 376.



are recommended to the especial care of all Mussulmans. The person who takes charge of such children occupies the position of a father towards them, and is entitled to inherit from them.*

* For fuller information on the subject, see 3 D'Ohsson's *Tableau-Général de l'Empire Ottoman*.



CHAPTER V.

THE PATRIA POTESTAS.—THE RIGHT OF JABR.

AMONG the ancient Arabs and the Hebraic tribes settled in Arabia, the power of the father seems to have been as absolute over his children and all members of the family, of which he was the recognised head, as it was among the Romans.

This unfettered exercise of the *patria potestas*, which recognised no limit or check to the caprices of irresponsible family chiefs, was restrained within reasonable bounds by the legislation of Mohammed.

A Mussulman father has, subject to certain well-defined conditions, the power of *imposing* the status of marriage on his children; of compelling them up to a certain age to live in the paternal house; and of partially correcting them when necessary.

Most of the provisions relating to the *patria potestas* are not peculiar to the Mohammedan law. The distinguishing feature of Islâmic jurisprudence, as compared with modern systems of law, consists in the power of the father to *impose* the status of mar-



riage on his *minor* children. It is known as the right of *jabr* and is recognised with various modifications by all the schools.

The right of *jabr* is founded on the original *patria potestas* which existed among the Arab tribes from the earliest times. Among them the father had the right of compelling his sons to marry until such time as they were capable of bearing arms, and the daughters until their *emancipation*, by marriage or otherwise, from his control.*

Among the Jews the father could give his daughter in marriage without her consent as long as she was a minor, that is, had not attained the age of twelve.†

Under the Mohammedan law, according to all the schools, the power of the father to give his children in marriage without their consent can be exercised in the case of sons until they have attained their *bulûghyèt* or puberty, when they are emancipated as far as their personal rights are concerned, from the *patria potestas*, and are at liberty to contract themselves in marriage. As regards female children there is considerable divergence of views among the several schools.

Persons not *sui juris* labour under the same legal disabilities as in other systems of law. They cannot enter into any contract or legal transactions without the consent of their natural guardians.‡ The want of capacity, which is the consequence of minority, is

* Perron, "Femmes Arabes," pp. 191-226.

† "Code Rabbinique," Ebn Haezer, vol. i. p. 123.

‡ See Note i. at the end of this chapter.



founded on the principles of right reasoning and the desire to protect people not competent to exercise sound discretion in the affairs of everyday life, from the consequences of their own acts.

An infant, accordingly, is incompetent to enter into a contract of marriage without the consent of his or her guardian. A marriage contracted by a minor, who is possessed of understanding (*rushd*) is not, however, absolutely invalid, but its validity, like that of any other act committed, or contract entered into by an infant, is dependent on its ratification by the guardian, or by the person who stands in *loco parentis*.*

The power, which the Mussulman law vests in the father, of imposing the status of marriage on his minor children is, in principle, absolute and unlimited. But this power is surrounded with so many conditions and formalities, that the mischief which otherwise might arise from it, rarely occurs in practice. The right of *jabr* in its harsher form terminates practically with puberty.

Puberty is presumed on the completion of the fifteenth year, according to most of the schools,† unless there is evidence to the contrary. As a general rule, however, a person who completes the fifteenth year is considered, without distinction of sex, to be adult and *sui juris*, possessed of the capacity to enter into legal transactions (تصرفات شرعيه, *tassuruffât shariyèh*).

* 1 "Fatâwa-i-Alamgîrî," p. 377; "Kanz-ud-Dakâik;" "Jâma-ush-Shattât."

† 3 "Hed.," p. 482-483; "Jâma-ush-Shattât." The presumption may be rebutted.

After the age of fifteen every contract of marriage entered into on their behalf is dependent upon their *express* consent; and, among the Hanafis and the Shiahs, the children of both sex, are free to contract marriages without the consent of their guardians.*

There is no divergence between the several schools as regards the capacity of a son to contract himself, after he has completed his fifteenth year, though there exists considerable difference of views as regards the capacity of female children.†

The Hanafis and the Shiahs hold that the right of *jabr* in the case of males, as in that of females continues until they have arrived at the age of puberty.‡

"It is not lawful for a guardian," says the "Hedâyah," "to force an adult virgin into marriage. None, not even a father nor the sovereign, can lawfully contract a woman in marriage who is adult and of sound mind without her permission, whether she be a virgin or not."§

Similarly, the Shiah law declares that neither a father nor a grandfather has authority over an adult and discreet virgin, who is herself competent to enter into a marriage contract." This rule applies also to a woman who is not a virgin.||

* "Fusûl-i-Imâdiyah;" "Jâma-ush-Shattât;" "Irshâd-i-Allâmah;" "Al-Muharrar (Shâfeî)."

† "Al Wâfi;" "Ikhtilâf-i-Aimmah" (India Office copies).

‡ 1 "Hed.," p. 96; 1 "Fatâwa-i-Âlamgîrî," p. 399; "Kanz-ud-Dakâik" (Pers. Transl.); "Sharâya," p. 263; "Jâma-ush-Shattât."

§ 1 "Fatâwa-i-Âlamgîrî," p. 405.

|| "Sharâya," p. 263.



The followers of MĀlik and Shāfeī, on the other hand, are of opinion that the exceptional right of *jabr*, in the case of females, continues in force until they are married, and consequently emancipated from paternal control.*

These schools also hold that the right of *jabr* does not cease when the girl is *safiha* (devoid of intelligence), or when she has been married whilst yet a minor, and has been divorced before arriving at maturity.†

Though the right of *jabr* is theoretically an absolute right, in practice there are numerous conditions attached to its exercise. The father, without any difference among the jurists, is prohibited from marrying his child to those who are diseased, to slaves, idiots, and other ineligible persons. But Abū Hanīfa and his two disciples seem to differ on the question, how far a marriage contracted by a father on behalf of a girl for an inadequate consideration (*mahr*) is valid in law. Abū Hanīfa appears to think that inadequacy of consideration is no ground for holding the marriage to be invalid. Abū Yussuff and Mohammed, however, are of opinion, that when the consideration is out of proportion to the fortune of the husband, the contract is not valid. And there seems to be a general consensus of opinion among all the jurists that where the father has acted "wickedly or carelessly," the marriage is voidable.‡

* "Kitab-ul-Anwār l'âmâl-ul-abrâr," book on *nikah* (marriage.)

† *Ibid*; Al-muharrar.

‡ 1 "Fatâwa-i-Alamgiri," p. 412; "Kitâb-ul Anwâr;" "Jâma-ush-Shattât."



If a man agree on behalf of his minor son to pay a dower far beyond the means of the infant; and there is reason to believe that he acted *mala fide*, the marriage would be similarly voidable.

In fact the law is particularly attentive to the interests of the child. It takes care that the right of *jabr* should never be exercised to the prejudice of the infant; any act of the father which is likely to injure the interests of the minor is considered illegal, and entitles the Kâzi or judge to interfere in order to prevent the completion of such act, or if complete to annul it.*

Nor can the father indefinitely abuse his authority by systematically refusing his consent to the marriage of his children. Such cases are necessarily rare, the Islâmic system being opposed to monasticism and celibacy; still, as cupidity may prompt a father to refuse successive suitors for his daughter the Kâzi or *Hâkim-i-shara* is authorised to interpose, provided on inquiry he finds *sufficient* and *reasonable* cause for so doing. In India, this function would probably be assumed by the civil court upon the application of the guardian next in order to the father. For example, a case may occur in which a mother is quite willing that her daughter should marry an eligible suitor, but the father, without any good reason and simply from caprice, withholds his consent. Under these circumstances the civil court would, under the Mahommedan

* "Sautayra"; "Bukhâri;" Jâma-ush-Shattât;" "Fusûl-i-Imâdiyah."

law be authorised to restrain him from any interference with the marriage, and the order of the court would be tantamount to the consent of the father.

What would be *sufficient* and *reasonable* cause to justify or warrant the interference of the *Hâkim-i-Shara*, would depend, of course, on the special circumstances of each individual case.*

Among the Hanafis and the Shiahhs, the children are emancipated from the *patria potestas* on attaining puberty; an abuse of the paternal authority among the followers of these two sects is impossible where the children are adult and discreet. Should a father persist in refusing his consent to the marriage of his adult daughter, she can herself enter into a contract of marriage validly even against his will and without his consent. "If the guardians of an adult and discreet virgin should refuse to marry her to an equal, when desired by her to do so, there is no doubt that she may enter into the contract of marriage against their will."† The "*Jâma-ush-Shattât*" says, in answer to the question, "Is the consent or permission (*izn*) of the father *necessary* to the marriage (*aqd*) of a virgin who is adult and discreet (*bâligha* and *rashîda*)?" that such permission is not necessary, her own consent being enough, to make the contract valid in law.‡

If the marriage contracted by her is unequal, that

* De Ménerville, "Jurisprudence de la Cour d'Alger," p. 451.

† "*Sharâya*," p. 263.

‡ "*Jâma-ush-Shattât*."



is, should she contract herself in marriage to a person far inferior in rank or position, the father would have a right to object, but such objection must be urged before the Kâzi.

Among the Shâfeïtes and the Mâlikites, with whom a girl is not absolutely emancipated from the *patria potestas* until she is married, the abuse of the paternal authority is probably more frequent. The hardships occasionally entailed by the Shâfeï and Mâlikî doctrines are obviated by the facility accorded to the followers of the several Sunni schools, to attach themselves either to one school or the other, as inclination or conviction may suggest. For example, an unmarried girl of eighteen, who, according to the Mâlikîs, would remain subject to the father's authority until she was married, may at any time emancipate herself by declaring herself to belong to the Hanafî school.

This point was discussed at some length in the case of *Muhammad Ibrahim bin Muhammad Sayad Parkar v. Gulam Ahmed bin Muhammad Sayad Roghe and another*.* In this case a girl named Khadija, whose family were of the Shâfeï sect, had on arriving at puberty made a declaration before the Kâzi of Bombay that she had renounced the Shâfeï doctrines and had adopted the tenets of the Hanafîs. Shortly after this she was married to the plaintiff, apparently with her own consent and in accordance with the Hanafî rites. Her father, however, had never consented to her mar-

* 1 "Bombay High Court Reports," O.C.J., p. 236.



riage with the plaintiff. In a suit brought by the plaintiff against the father for unlawful detention of his wife, the principal legal question raised and discussed turned on the point whether the marriage contracted with the plaintiff was void in consequence of the girl's father not having consented to it. The Court, consisting of Sausse, C.J., and Couch, J., in an exhaustive and well-considered judgment, held (1) that according to the Mahommedan law, a Mussulman female belonging to any one of the four Sunni schools, "can, after attaining puberty, elect to belong to whichever of the other three sects she pleases, and the legality of her subsequent acts will be governed by the tenets of the Imâm whose follower she may have become;" (2) that, according to the doctrines of the Hanafis, "a Mussulman female, after arriving at the age of puberty, without having been married by her father or guardian can select a husband without reference to the wishes of the father or guardian, though according to the doctrines of Shâfeï, a virgin, whether before or after puberty, cannot give herself in marriage without the consent of her father;" (3) that consequently the marriage contracted by Khadîja, by her own consent was valid and binding.*

* "There is not any ceremonial required," added the learned judges in the course of their judgment, "to indicate the change of sect; the only outward difference between a follower of Shâfeï and a follower of Abû Hanîfa consists in the former at the conclusion of prayer in a mosque saying *Âmîn* in a loud tone, whilst the latter pronounces it softly, and also that in praying, a Shâfeï extends his arms, whilst a Hanafi keeps them down."



When the father of a family is incompetent, by reason of mental incapacity, to exercise the right of *jabr*, the guardian next in order to him exercises that right, and can, in the same way, when the father is absent at such a distance as precludes him from acting, lawfully contract a child in marriage.*

The "Jâma-ush-Shattât" gives examples of cases where marriages contracted by the mothers of infant children, during the absence of the fathers in distant townships have been held to be valid.

The nature of the absence or the distance which would justify the exercise of the right of *jabr* by the guardian next in order to the father is of particular importance, and has attracted the especial attention of the Mussulman jurists. The "Hedâya" says, "if the father or the first natural guardian of an infant should be removed to such a distance as is termed *ghibât-ul-munkata*, it is in that case lawful for the guardian next in degree to contract the infant in marriage." And then it explains, "By the absence termed *ghîbat-ul-munkata*, is to be understood the guardian being removed to a city out of the track of the caravans or not visited by the caravans more than once in every year. Some, however, have defined it to signify a distance amounting to three days' journey."†

* 1 "Fatawa-i-Alamgîrî," p. 401; 1 "Fatawa-i-Kâzi Khân," p. 406. According to the Shâfeîs, in the absence of the "preferential guardian," the right passes to the "Sultân and the Kâzi," 1 "Kâzi-Khân," p. 406.

† 1 "Hed." Eng. Transl., pp. 108, 109.



According to the "Fusûl-i-Imâdiyah" *ghîbat-ul-munkata* implies such a distance, or such an absence, as precludes the possibility of obtaining the father's sanction to any contract entered into by the guardian on behalf of the infant, without serious inconvenience. The "Fatawa-i-Alamgirî"* and the "Fatawa-i-Kâzi Khân" seem to point in the same direction. The general conclusion arrived at from the authorities quoted is that each case must be decided on its own individual basis.

The Calcutta High Court has decided that where a father is in prison, a marriage contracted for his infant daughter by the mother and grandmother without his consent is valid and binding.†

It does not appear, however, from the report whether the parties were Shâfeîs, Hanafîs, or Shiahs. The result, however, according to all the schools, would be the same, if the imprisonment of the father were of such a nature as to prevent his giving his consent to the marriage. Could his consent have been obtained without difficulty, there would be some doubt as to the correctness of the judgment.

In another case which was decided on the original side of the Calcutta High Court, it was held that the apostasy of the father led to the forfeiture of the right of *jabr*. In that case a Mahommedan female had married a Jew convert to Islâm. A female child was

* 1 "Fatawa-i-Alamgirî," p. 401; 1 "Fatawa-i-Khâzi Khân," p. 406.

† 12 "Sutherland's Weekly Reporter," p. 10.

born of the union, who was brought up in the Shiah doctrines professed by the mother, although the father soon after its birth, had returned to his former faith. Subsequently, the mother contracted the girl in marriage to a Shiah Mussulman. Upon an application of the father to obtain possession of the person of the child, on the ground that the marriage contracted by the mother was invalid, inasmuch as he had not assented thereto, Macpherson, J., decided that, under the Mahommedan law an apostate is not entitled to exercise the right of assenting to the marriage of his children, who have been contracted by the guardian next in order to him; and that therefore the marriage of the applicant's daughter was valid without his assent.*

A similar case is given in the "Jâma-ush-Shattât." The question there put to the Muftahid was, whether the marriage contracted by the mother on her daughter's behalf was valid without the consent of the father, who had become a pervert to Christianity. The answer was in the affirmative.

In the absence of the father the Shâfeis and the Shiahs allow the right of *jabr* to the grandfather.†

The Mâlikis consider the right essentially personal, and belonging exclusively to the father in his quality of father. In the absence of the father the right,

* In *re Mahin Bibi*, 13 "Bengal Law Reports," O.C.J., p. 160.

† "Al-Moharrar;" "Kitâb-ul-Anwâr;" "Mafâtîh;" "Sharâya;" "Ikhtilâf-i-Aimma;" 1 "Fatâwa-i-Khâzi Khân," pp. 405-407.



according to this school, passes to his executor or to the Kâzi.

The Hanafis allow the right of *jabr* not only to the testamentary guardian, but also to all natural guardians.* "The guardians in marriage," says the "Sharh-i-Vikâyah," quoted by Shama Churn Sircar, "are the agnates or residuaries according to the same order as in the inheritance and exclusion. By residuaries is meant residuaries in their own right, that is, males related without the intervention of females; first, the mother, then the distant kindred in order of proximity; then the successors by contract (*moula-al-mawâlât*), and then the judge.† "The guardianship (*wilâyet*) in marriage belongs," says the "Fatâwa," "in the first place to the *Asabâh*, in the order of inheritance, the more remote being excluded by the nearer."‡

The order of these agnatic guardians is (1) the lineal male descendants, (2) the lineal male ascendants, and (3) the male relatives in the order of succession;§ *those related by both parents having precedence over those related by the father only.* "All these guardians have the honour of *jabr*," says the "Fatâwa," "over a female or male during minority."

The Shiah, as stated before, accord the right to the father and the grandfather, but deny it to every

* D'Ohsson, "Tab.-Gen. de l'Empire Ottoman," vol. iii. p. 110.

† Vol. i. p. 329.

‡ 1 "Fatâwa-i-Alamgiri," p. 399.

§ 1 "Fatâwa-i-Kâzi Khân," p. 405.

other relation; in this they agree with the Shâfeis. According to the "Sharâya" "an executor has no authority in marriage, even if it were expressly given by the testator; nor has the judge any power over a person who is not adult."*

In the case of one who is devoid of intelligence, both the testamentary guardian and the Hâkim have a qualified authority.

If the marriage is for the benefit or for the protection of the interests of the *non compos mentis*, it is valid. If otherwise, it is invalid.

Among the Hanafis, in the absence of the agnates, the power is passed on to the uterine relations in the same order,† and in their default to the *Moulâ-al-Mawâlât*, and in his absence to the ruler and the kazi.‡

If the mother be a testamentary guardian, or acts as an executrix to her deceased husband, she takes precedence over the others.§

* "Sharâya," p. 263; "Mafâtih;" "Irshâd-i-Allâmah."

† The mother comes in after the *Asabâh nasabiyè* and the *Asabâh-i-sababiyè*.

‡ 1 "Fatâwa-i-Alamgîrî," p. 400.

§ "It is necessary here to mention that the passage in the "Fatâwa-i-Alamgîrî" leaves the matter in some doubt. It says—

الوصي لا ولاية له في انكاح الصغير والصغيرة سواء اوصي اليه الاب ولم يوص الا اذا كان الوصي وليهما في يملك الانكاح يحكم الولاية لايجزم الوصاية *

The purport of this passage is that an executor has no authority to contract a male or a female minor in marriage . . . except when the executor happens to be a natural guardian, and then he



In the Shiah law the mother has no power of contracting her children in marriage, not even as executrix of the father.

Generally speaking, whilst a *walî-i-jâbir** is present and is qualified to exercise the right of *jabr*, or to give his consent to a marriage contracted for his infant child, the mother has no power to marry such child against the wishes of the "preferable guardian." All the schools, however, seem to agree in holding that when the right is exercised prejudicially to the interests of the child by the *walî-i-jâbir*, the mother has "a right to interfere." "When the father marries his poor daughter to a man equally poor," says "Sîdî Khalfî," "the mother has the right of intervention."

There are passages of like import in the (Shiah) "Jâma-ush-Shattât," and the (Hanafi) "Fusûl-i-Imâ-diyah," and the "Fatâwa-i-Kâzi Khan." A comparison of the views enunciated by the jurists of the various schools, leaves no doubt that the mother's right of interference will be regulated according to the exigencies of each particular case.

has the power, by virtue of his guardianship, not by his executorship. The mother, however, is a natural guardian. See "Jurisprudence de la Cour d'Alger," 1864.

* A guardian who is by law vested with the right of *jabr*.



NOTE.

The Indian readers of this treatise will perhaps find it of some interest to know that under the French law a man cannot marry until he has attained the age of eighteen, nor a woman until she is fifteen. The consent of both parents is required, by a son under twenty-five years of age, and a daughter under twenty-one. If the parents disagree as to the consent, the father's sanction is held sufficient. If the parents are dead, then the consent of the grandfather and grandmother is requisite to contract a valid marriage. In their absence, the consent of the family council (*conseil de famille**) must be obtained. Even when a man has attained his twenty-fifth year, and the woman her twenty-first, both are still bound to ask, by a formal notification, the consent of their parents, and until the man has attained his thirtieth year and the woman her twenty-fifth, this formal act must be repeated thrice at the interval of one month; and one month after the third application, it is lawful for the parties to marry with or without consent. After the age of thirty, a man or woman may legally marry without the consent of his or her natural guardians a month after formal notice has been served upon them by two notaries or by one notary and two witnesses.

Under the English law, a person, whether male or female, cannot marry without the consent of the parents until the age of twenty, though amongst the operatives and colliers in Lancashire and amongst the agricultural labourers in England, they do contract such marriages in thousands, as I have been informed.

* "Code Napoléon," art. 182.

CHAPTER VI.

THE RIGHT OF THE MOTHER TO THE CUSTODY OF HER CHILDREN (AL HAZÂNAT الحضانة).

“THE mother is of all persons,” says the “Fatawa-i-Alamgîrî,” “the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution.”*

This right belongs to her *quâ* mother, and nothing can take it away from her, except her own misconduct.

The paternal power, discussed in the previous chapter, is exercised over the person and property of infant children, presumably for their benefit. And when the tenderness of their age, or the weakness of their sex, renders a mother's care necessary, the Mahommedan law supports the mother's natural right to the custody

* احق الناس بحضانه الصغير حال قيام النكاح وبعد الفتره

* الام 1 “Fatawa-i-Alamgîrî,” p. 728.



of her children, and allows it to take precedence of the paternal right for a certain specified time.

When the children are no longer dependent on the mother's care, the father has a right to educate and take charge of them, and is entitled to the guardianship of their person in preference to the mother.

Among the Hanafîs the mother is entitled to the custody of her daughter until she arrives at puberty;* among the Mâlikîs, Shâfeîs, and Hanbalîs the custody continues until she is married.† According to the judgments of the Court of Algiers it appears that, in several notable instances, the Hanafî Kazis have followed the Mâlikî doctrines, and decided that the mother is entitled to the custody of her daughters until their marriage.

An analysis of the dicta contained in the authorities recognised among the eastern Hanafîs, leads to the conclusion that the difference between the doctrines of the Mâlikîs and the Hanafîs respecting the term during which the mother's custody lasts, is not so great nor so marked as would at first appear. The "Fatâwa" which gives the opinions of several jurists, points to the conclusion that the right of *hazânat* terminates when the girl is *marriageable*. The Mâlikîs hold that it should continue until she is *actually married*. As, in eastern countries, girls are

* 1 "Fatâwa-i-Alamgîrî," p. 730; 1 "Fatâwa-i-Kâzi Khân," p. 478.

† 1 "Santayra," p. 348; "Sidi Khalîl."



generally contracted in marriage as soon as they are marriageable, and occasionally before they have arrived at maturity, it is apparent that there is practically no difference between the two schools. It may be remarked, however, that the Mâlikî doctrines are more conformable to right reasoning, and furnish a definite standard for the guidance of those who have to administer the law. Probably the Anglo-Indian courts in deciding questions bearing on this point would follow the precedents of the Algerian courts, which have adopted the Mâlikî rule as the guiding principle in all such cases.

There is greater divergence among the different Sunni schools with reference to the mother's custody of her male children. The Mâlikîs hold that the right of *hasânat* in respect of a male child continues until such time as he arrives at puberty. "This is the formal test of Sidi Khalîl," says Sautayra, "constantly applied in jurisprudence."*

The Shâfêis and the Hanbalîs allow the boy at the age of seven, the choice of living with either of its parents. Should he prefer to continue with his mother, he is allowed to do so until he attains the age of puberty, when he has no option and his guardianship devolves on the father. In practice, however, the father's right to the custody of the boy's person terminates with his puberty, for he is then *personally* emancipated from the *patria potestas*.†

* 1 "Sautayra," p. 348.

† "Kitâb-ul-Anwâr."

The Hanafi jurists, however, hold that the mother's *hazânat* of a male child, ends with the completion of his seventh year. "The mother and the grandmother," says the "Fatawa," "are entitled to the custody of a boy until he is independent (of their care), that is, until he is seven years old." But, adds the "Fatawa," "Kudûrî has declared (that the custody lasts) until the boy is able to eat and drink and perform the necessary ablutions by himself; Abû Bakr ar-Râzî puts the limit at nine years; the *fatwâ* (however) is according to the first doctrine."*

Among the Shiah's the mother is entitled to the custody of her children without distinction of sex until they are weaned.† During this period, which is limited to two years, the children cannot under any circumstance be removed from their mother's care‡ without her consent. After the child has been weaned, its custody, if a male, devolves on the father and if a female on the mother. The mothers' custody of a female child continues to its seventh year; but the father may

* 1 "Fatawa-i-Alamgirî," p. 730; 1 "Kâzi Khân," p. 478; "Fusûl-i-Imâdiyyah."

الام والجدة احق بالغلام حتي يستغني وقد ير بسبع سنين وقال
 القدوري حتي ياكل وحده ويشرب وحده ويستغني وحده وقدره
 ابو بكر الرآزي بتسع سنين والشتوي علي الاول *

† D'Ohsson says, "The mother's right lasts in the case of male children up to the age of seven, eight, or nine years; in the case of female children until their majority or their marriage," 3 "Tab. Gen. de l'Empire Ottoman," p. 104.

‡ "Jâma-ush-Shattât," "Jâma-i-Abbâsî," "Sharâya-ul-Islâm."



allow the mother to retain the custody of the children of both sexes beyond the period specified by the law.*

It will be seen that, though the period of *hazânat* varies among the different schools, the general principle which governs its duration is founded essentially on the interests of the child. "At the age of nine,"† says D'Ohsson, "a boy passes from the care of his female relations into the hands of his father, in order to receive from the father, a masculine education analogous to the paternal status, condition, and fortune."

When both the parents are of the same school it is easy to determine the period of the *hazânat*; but if they belong to different schools, the principle upon which the question of custody should be determined is not entirely free from difficulty.

It may be stated, as a general rule, that as the right of *hazânat* has in view the exclusive benefit of the infant, each particular case would be governed by the doctrine in force among the sect to which the child is supposed to belong; or, if that cannot be ascertained, by a consideration of what would be best for the child as a Moslem child. This rule has been adopted by the Court of Algiers, and no difficulty has been found in its application to individual cases.

The terms of the judgment delivered by the Court of Algiers, on the 15th of April 1872, leave no room for

* "Jâma-ush-Shattât."

† The Hanafis of Turkey seem to extend the duration of the *hazânat* up to nine years.



doubt on the question. In the case referred to it appeared that one, Lakhal ben Mohammed, married a girl of the name of Ayesha bint Mustapha. A boy of the name of Mohammed was born of this union, after which a separation took place between Lakhal and Ayesha. When the boy reached the seventh year of his age, Lakhal applied to the Hanafî Kazi to obtain possession of the child's person. The Kazi of Algiers gave a decree in favour of Lakhal, but on appeal to the Court of Algiers, this judgment was reversed and the child was allowed, in accordance with the Mâlikî doctrines, to remain with the mother.

Subject to the limitations already pointed out as regards the duration of the *hazânat*, the custody of infant children devolves, in the first place, upon their female relations; and it is only when there are no female relations that the right descends to the male relatives.

The Mâlikîs differ to some extent from the Hanafîs respecting the order in which the right of custody is possessed by the various relations. For example, the Mâlikîs hold that, failing the mother of the child, the right passes (1) to the maternal grandmother; (2) to the great-grandmother; (3) to the maternal aunt and grand-aunt; (4) to the full sister; (5) to the uterine sister; (6) to the consanguine sister; and (7) to the paternal aunt. "When there are no relations of these degrees, or none qualified or willing to exercise the right of *hazânat*, it passes to the father, and failing him to his executor, his son, his nephew, his uncle, and his cousin."



According to the Hanafîs, the order runs thus:— (1) the mother ; (2) the mother's mother ; (3) full sister ; (4) uterine sister ; (5) consanguine sister ; (6) the daughter of the full sister ; (7) the daughter of the uterine sister ; (8) the daughter of the consanguine sister ; (9) the maternal aunts ; and (10) the paternal aunts.* The general principle upon which the right of these relations is founded, is common to both the schools, viz., that "the custody of an infant belongs by right to the mother's relations, and those connected through her (that is, *uterine* relations,) are preferred to those connected with the child on the father's side only (that is, the consanguine relations)."[†]

According to the Hanafîs, if there be no female relations, or if none of them are legally qualified to exercise the right, it passes (1) to the father ; (2) failing him, to the paternal grandfather ; (3) to the lineal male ascendant of the third degree, or still higher ; (4) to the full brother ; (5) to the consanguine brother ; (6) to the full brother's son ; (7) to the consanguine brother's son ; (8) full paternal uncle ; (9) to the half paternal uncle on the father's side ; and (10) to the son of paternal uncles in the same order.‡ Among these relations also the nearer always excludes the more remote.

No male has a right to the custody of a female

* 1 "Fatawa-i-Alamgîrî, pp. 728-729.

† *Ibid.*, "Kitâb-ul-Anwâr."

‡ *Ibid.*

child unless he is a *mahram*, that is, is within the prohibited degrees of relationship to her, and cannot under any circumstance marry her. Though a boy may be entrusted to the care of the paternal uncle's son, a girl cannot be placed under his guardianship, he not being a *mahram* to her.* An *Asabâh* who is profligate is not entitled to the custody of a female child.†

When there are several relations of the same line or degree, all equally qualified and willing to take charge of the child, the custody should be entrusted to the one who shows the greatest tenderness to it.‡

In the absence of the natural guardians, or when none of them are qualified to take charge of a minor, the custody of the child devolves on the judge, who should place the infant in the care of a trustworthy person of the same sex as the infant.§

The right of *hazânat* appertains equally to Moslem and non-Moslem mothers. When, therefore, a Moslem marries a non-Moslem, and there be issue of that marriage, the mother is entitled to exercise the *hazânat* over her children, as would a Moslem mother. Al-Karkhî explains that the right of *hazânat* belongs to a mother in her capacity and character of mother; and consequently she does not forfeit that right by the fact of belonging to another faith than the Mos-

* "Fusûl-i-Imâdiyyah," 1 "Fatâwa-i-Alamgîrî," p. 729.

† *Ibid.*

‡ 1 "Hed." pp. 385, 386, 389.

§ 1 "Fatâwa-i-Alamgîrî," p. 730; "Fusûl-i-Imâdiyyah."



lem faith. Apostasy and misconduct in the mother being considered prejudicial to the interests of the children form a bar to their remaining in her custody.

The Shiahhs are in agreement with the Sunnis with regard to the general principles governing the right of *hazānat*. But among them, in the absence of the mother, the right passes to the father, and failing him to the grandparents and other ascendants. When there are no ascendants, the right passes to the collaterals within the prohibited degrees, the nearer excluding the more remote.

The qualifications necessary for the exercise of the right of *hazānat* are the following:—(1) that the *hāzina* should be of sound mind; (2) that she should be of an age which would qualify her to bestow on the child the care which it may need; (3) that she should be well-conducted; and (4) that she should live in a place where the infant may not undergo any risk morally or physically.

The right of *hazānat* or custody, according to all the schools, is lost (1) by the subsequent marriage of the *hāzina*; (2) by her misconduct; and (3) by her changing her domicile so as to prevent the father or tutor from exercising the necessary supervision over the child.

1. The right of a woman to the custody of an infant child is made void by her marriage with a "stranger," the presumption of law being that a woman entering a new family will not have the same love or affection for the child as before. But if she marry a relation



of the infant, within the prohibited degrees, the right of *hazânat* does not fall to the ground. For example, if a mother marry the child's paternal uncle, such marriage being valid under the Mahommedan law, she does not forfeit her right to the custody of her infant children.

The decisions of the Algerian Courts, which are strictly in accordance with the doctrines of the Mahommedan law, recognised by all the schools, furnish some leading principles which serve to explain and elucidate the exact significance of the above rule.

It has been decided by the Court of Algiers that when a mother, separated from her first husband, marries a second time in order to secure for her infant child a better and more comfortable living, she does not forfeit her right of *hazânat*.*

The Courts would preserve to the mother the custody of the child, if it be in its interest that it should remain with her.

It has also been decided, in accordance with an authoritative Fatwâ, delivered by the Mufti of the Madrissa of Algiers, that where the *hâzina* contracts a second marriage, and the father does not, within the space of one year from the date of such marriage, or from the date of his knowledge thereof, claim the person of the infant, he should be supposed to have abandoned his right over it, and it would remain thenceforward definitely under her care.

* Decrees, dated 8th of October 1862, 29th of June 1865, and 9th of December 1867.



RIGHT OF MOTHER TO CUSTODY OF CHILDREN. 205

When the right of a mother or any other female relation lapses by marriage, it revives when the marriage is dissolved.*

2. The right of *hazânat* is lost by the misconduct of the *hâzina*. If she be found leading an immoral life or frequenting the society of women of ill fame, or if she be convicted of theft, she forfeits her right to the custody of the infant.

The "Fatawa" says, as we have seen before, that of all persons the mother is the best entitled to the custody of her infant children, "unless she be an apostate, an immoral woman, or one unworthy of being trusted."† It goes on to say that a woman who habitually leaves her home and neglects her children, and allows them to starve, is unworthy of trust, i.e. of having the custody of infants confided to her. The "Nahr-ul-Fâik" says, "a woman has no right to the custody of a child, if she be a thief, an adulteress, a public singer, or a professional mourner." The odium attached to the two latter classes of women originated in the fact that in Eastern countries, immorality is generally associated with the profession or calling they follow.

The "Fatawa's" dicta supplies the general principle governing these cases, by declaring that misconduct which would disqualify a mother, or any other female

* 1 "Fatawa-i-Alamgiri," p. 728; "Fusûl-i-Imâdiyah;" 1 "Fatawa-i-Kâzi Khân," p. 478. There is no difference between the Shiahs and the Sunnis on these points.

† 1 "Fatawa-i-Alamgiri," p. 728.



relation from exercising or claiming the *hazânat* of a child would be "such wickedness as would be injurious to the child."*

It will be seen, therefore, that a woman guilty of misconduct is not entitled to claim the right of custody. Similarly, if the misconduct occur *after* the right has vested in her and the child has been confided to her care, she forfeits the *hazânat*, and the father, or person occupying his place, takes charge of the infant.

The case of *Abasi v. Dunnet*† was decided in the Allahabad High Court on the basis of the former principle. It was held that a public prostitute was disqualified from having the custody of her infant sister. This was no doubt in accordance with the Mahommedan law. But no attention seems to have been paid in the decision of that case to the allegation of the plaintiff, that her sister was being brought up in the tenets of Christianity, by the people to whom her custody had been entrusted by the magistrate. *Except in the case of a non-Moslemah mother*‡ the Mahommedan law, generally speaking, does not permit the custody of a Moslem child to be confided to any other than a Moslem or Moslemah. The order of the magistrate, therefore, in the case of *Abasi v. Dunne*, in pursuance of which the child was placed in a Christian orphanage and brought up as a Christian

* See the judgment of the Kâzi of Constantine, 16th of November 1860; "Jurisprudence de la Cour d'Alger," De Ménerville.

† 1 Ind. L. R. All. Series, p. 598.

‡ "Al-Karkhî."



was illegal, and needed some notice from the High Court of Allahabad.

Apostasy is also a bar to the exercise of the right of *hazânat*. A woman, consequently, who apostatizes from the Islâmic faith, whether before or after the right vests in her, is disentitled from exercising or claiming the right of *hazânat* in respect of a Moslem child.

The provisions of Act XXI. of 1850 make no alteration in the principles of the Mahommedan law bearing on this subject. The effect of that Act is confined to questions of inheritance. Consequently a pervert to Christianity, though she may not lose her right of inheritance, would still forfeit her right of guardianship in respect of her infant relations. For example, if a man die leaving two daughters, one of whom is an infant, the elder one would in the absence of other female relatives be entitled to the custody of her sister. If, however, it appeared that she had apostatized from Islâm previous to the decease of her father, she would be disqualified from claiming the *hazânat* of her sister, though her right of inheritance would be preserved to her by Act XXI. of 1851.

Under the Hindoo law, unchastity in a woman is a bar to succession, but if property have once vested in her it would not be forfeited by her subsequent unchastity.

Under the Mussulman law unchastity does not disqualify a woman from succession, though in the in-



terest of public morality it disqualifies her from exercising the right of *hazânat*.

3. The right of *hâzânat* is also liable to forfeiture in case the *hâzina* removes the child, without the consent of its father or guardian, to such a distance from his usual place of residence as would prevent him from exercising the necessary supervision or control over her.* But this rule is subject to considerable qualification. When the change of residence is caused by unavoidable exigencies, or when it has been made for the benefit of the child, the right of *hazânat* is not lost. For example, a woman, who earns her livelihood by going into service, may be obliged to follow her employers from one place to another and take her child with her. The frequent change of residence resulting from the necessities of employment would not lead to the forfeiture of her right of custody. If a woman attempt to remove with her child from the usual place of residence, and the husband were to apply to the Kâzi or magistrate to obtain the person of the infant upon the ground of its removal, the magistrate is bound to inquire into the facts of the case, and on being satisfied that the removal is only temporary or undertaken in the interests of the child, to allow it to remain in the mother's custody.†

Whilst the marriage subsists "the conjugal domicile is the place of *hazânat*;" thus the home where the

* 1 "Fatâwa-i-Alamgîrî," p. 731; "Jâma-ush-Shattât;" "Fusûl-i-Imâdiyah."

† "Jurisprudence de la Cour d'Alger," De Ménerville.

RIGHT OF MOTHER TO CUSTODY OF CHILDREN. 209

parents usually reside and live together as husband and wife is the place where the child should be brought up. Accordingly, the father cannot leave the city where they are residing and take the child with him out of the custody of the mother without her consent.*

When a separation has taken place between the parents, the mother is entitled to return with her infant child to her native city, (if the marriage took place there,) however distant it may be from the residence of the father. "But," adds the "Fatâwa," "she cannot do so if the marriage did not take place there, unless it is so near the place of separation that if the husband should leave his own residence in the morning to visit the child, he can return home before night;"† nor can she "remove to any other city on any other condition."

The following passage from the "Hedâyah" explains the principle more fully:—"To the propriety of the woman carrying her child from one place to another, two points are essentially necessary—one, that she be a *native* of the place to which she goes, and the other that her marriage took place there."

* 1 "Fatâwa-i-Alamgîrî," p. 731; "Kitâb-ul-Anwâr."

† اذا وقعت الفقرة بين الرجل وامرأة فارادت ان تخرج بالولد (عند انقضاء حدتها) الي مصرها فان كان النكاح وقع في مصرها فلها ذلك وان كان وقع النكاح في غير مصرها فليس لها ذلك الا ان يكون بين موضع الفقرة وبين مصرها قرب بحيث لو خرج الاب لمطالعة الولد يمكنه الرجوع الي منزله قبل الليل *



"This, however, means only where the places are considerably distant; but if they be so near that the father may go to see his child and return the same night, there is no objection to the wife going to the place with the child and there remaining; and this whatever be the size and degree of the places, whether cities or villages."*

According to the Mâlikî jurists, a distance of six *birîds* implies such distance as would prevent the father from exercising control or supervision over the mother. Each case, however, is decided, in spite of the apparently hard and fast rule of the Hanafîs and the Mâlikîs, upon its own merits.†

The following remarks of M. Sautayra contain the essence of the rule applicable to this branch of the law relating to *hazânat*.

"Ajoutons qu'il en est de la règle relative à l'éloignement de la *hâzina*, comme de celle édictée en cas du subséquent mariage; l'intérêt de l'enfant l'importe sur toutes les autres considérations, et les juges

* 1 "Hed." (English Translation), p. 391. The passage which follows is worthy of note:—"Nor is there any objection to her removing from the village to the city or chief town of a district, as this is in no respect injurious to the father, and is advantageous to the child . . . but the reverse (that is, her removal from a city to a village) would be injurious to the child, as he would thereby be liable to acquire the low manners and mean sentiments of villagers; wherefore a woman is not at liberty to carry her child from a city to a village" unless it is her native place and the marriage was celebrated there.

† A *birîd* is equal to four *farsangs*, each *farsang* being equal to three miles of 1,700 mètres each.



ont la faculté de subordonner l'application de la règle aux circonstances de fait. C'est ainsi, pour n'en citer qu'un exemple, que la femme Zainab a été autorisée à quitter Tlemcen pour se rendre, avec son nouveau mari à Mostaganem et à conserver la *hazânat* sur la fille qu'elle avait eue d'un précédent mariage, parce qu'il a été établi pour le juge que le premier mari avait, pendant plusieurs années, abandonné sa fille et qu'il ne présentait aucune garantie pour les soins à lui donner.* Jugement du 29 Mars 1865, confirmé par arrêt du 29 Juin suivant.”*

If the father remove from his usual place of residence or from the place where the *hâzina* is residing and exercising the rights of *hazânat*, he would have under certain circumstances, the power of withdrawing the child from the *hâzina's* custody. This power also is strictly subordinated to the interests of the child. If the infant be independent of the mother's care, if it be doubtful whether she would, when freed from the supervision of the father, bestow the same care and tenderness on the child as before, then the Kâzi may, in his discretion, grant the father's application to remove the child.

The principle which should guide the decisions of the magistrate in those cases is laid down in most explicit terms in a decree of the Court of Algiers, dated the 11th of February 1862. “Considérant,” it says, “qu'il s'agit de savoir si le père, voulant partir

* 1 “Sautayra,” p. 355.



pour la Mecque et s'y établir définitivement, peut, ainsi qu'il le prétend et que l'a décidé le jugement attaqué, emmener sa fille avec lui, malgré les protestations de sa mère; considérant qu'il est de principe en droit musulman comme en droit français, que lorsqu'il s'agit de statuer sur le sort d'un enfant appartenant à des parents divorcés, on doit rechercher principalement quel est le principal intérêt de l'enfant, et décider en conséquence à qui, du père ou de la mère, il doit être remis; considérant à cet égard, qu'indépendamment des hasards que la voyage projeté entraîne pour la jeune fille, sa translation et son établissement à la Mecque présentant des dangers encore plus réels; qu'en effet le père et la nouvelle épouse sont l'un et l'autre d'un âge avancé; que dans un temps prochain ils pourraient venir à manquer à la jeune fille et la laisser isolée, sans appui dans un pays lointain, *tandis qu'à Alger elle resterait sous les yeux de sa mère, qui lui a toujours prodigué les soins les plus tendres, et dont la conduite est irréprochable; qu'elle y trouverait encore la protection les secours et les conseils des frères et des autres parents de sa mère, qui tous lui portant le plus vif intérêt; infirme ordonne que la fille restera sous la garde de sa mère.*"

This decision shows plainly the governing principle in all questions of *hazânat*. The right is founded primarily for the benefit of the child, and is to be exercised by those relations who are most likely to bestow care and kindness on it.



RIGHT OF MOTHER TO CUSTODY OF CHILDREN. 213

The right of *hazânat* is a personal right, which the parties entitled can enforce by a judicial proceeding. Section 1 of Act IX. of 1861, declares that "any relation or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor may make an application by petition, either in person or by a duly constituted agent, to the principal civil court of original jurisdiction in the district." Whilst section 3 declares the power of the Court to "make such order as it shall think fit in respect of the custody or guardianship" after hearing the statements and evidence of the parties.

Under this Act the discretionary powers, vested in the Kâzis under the Mussulman law, are vested in the principal civil court of original jurisdiction in a district, and such courts are bound to administer strictly, in all questions affecting the custody of Moslem children, the provisions of the Mussulman law regarding *hazânat*.

Act XL. of 1858 declares that a civil court may appoint any person who is "willing and fit" to be the guardian of a minor; but it gives no definition of the legal signification of the word "fit" used in the Act. The fitness, therefore, will no doubt be judged according to the provisions of the Mahommedan law. But as s. 27 of this Act declares that no person "other than a female" shall be appointed, "as the guardian of the person of a female" minor, it would seem that the right of the male *Asabâh*, under the Sunni law, to the *hazânat* of a female infant is mate-



rially affected by the provisions of Act XL. of 1858.

The custody of illegitimate children appertains exclusively to the mother and her relations. If a child be a foundling, its custody belongs to the person who found it or to the State.*

Though a mother is entitled to take her child to her native city, no other female *hâzina* has a similar right.†

* "Tab. Gen. de l'Empire Ottoman," vol. iii. p. 101

† 1 "Fatâwa-i-Alamgîrî," p. 731.



CHAPTER VII.

THE STATUS OF MARRIAGE.—CAPACITY.—FORM OF MARRIAGE.
—PROHIBITIONS AGAINST MARRIAGE.

UNDER the Mahommedan law, marriage is essentially a civil contract. Its validity depends on proposal on one side and acceptance on the other. It does not require any formal deed nor is the presence of witnesses necessary for its legality; in fact a marriage contract rests on the same footing as other contracts, and is similar in effect to an ordinary partnership. The parties retain their personal rights, against each other as well as against strangers, and have power to dissolve the marriage tie, should circumstances render this desirable.

“Marriage, like other contracts,” to use the words of Mr. Baillie, “is constituted by *ijâb wa kabûl* or declaration and acceptance but it confers no right on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same powers of



using and disposing of her property, of entering into all contracts regarding it, of suing and being sued without his consent, as if she were still unmarried. She can even sue her husband himself, without the intervention of a trustee or next friend, and is in no respect under his legal guardianship ”

In the language of the law, as well as in common parlance, the formal conclusion of the contract is called *aqd*, conveying the same meaning as the term *obligation* in the Roman law. In fact, the *akd* is the completion of the contract which commences with the proposal or demand in marriage and ends with the consent.

Capacity.—The validity of a marriage under the Mahommedan law depends on two conditions : first, on the capacity of the parties to marry each other ; secondly, on the celebration of the marriage according to the forms prescribed in the place where the marriage is celebrated, or which are recognised as legal by the customary law of the Mussulmans. It is a recognised principle of law that the capacity of each of the parties to a marriage is to be judged of by their respective *lex domicilii*. “ If they are each, whether belonging to the same country or to different countries, capable according to their *lex domicilii* of marriage with the other, they have the capacity required by the rule under consideration. In short, as in other contracts so in that of marriage, personal capacity must depend on the law of domicil.”*

* Dicey on Domicil.



The *capacity* of a Mussulman domiciled in England will be regulated by the English law, but the capacity of one who is domiciled in the *Bilâd-i-Islâm*, by the provisions of the Mussulman law. It is therefore important to consider what the requisite conditions are to vest in an individual the capacity to enter into a valid contract of marriage. As a general rule, it may be remarked, that under the Islâmic law the capacity to contract a valid marriage rests on the same basis as the capacity to enter into any other contract.

Among the conditions which are requisite for the validity of a contract of marriage," says the "*Fatâwa-i-Alamgîrî*,"* "are understanding, puberty, and freedom in the contracting parties, with this difference that whilst the first requisite is essentially necessary for the validity of the marriage, as a marriage cannot be contracted by a *majnûn* (*non compos mentis*), or a boy without understanding; the other two conditions are required only to give operation to the contract, as the marriage contracted by a (minor) boy (possessed) of understanding is dependent for its operation on the consent of his guardian." Puberty and discretion constitute, accordingly, the essential conditions of the capacity to enter into a valid contract of marriage. A person who is an infant in the

* اماشروطه فمنها العقل والبلوغ والحرية في العاقد الا ان الاول شرط الاعتقاد فلا ينعقد نكاح المجنون والصبي الذي لا يعقل والاخيرين شرطا النفاذ فان نكاح الصبي العاقل يتوقف نفاذه علي اجازة وليه *

1 "*Fatâwa-i-Alamgîrî*," p. 377; 1 "*Kâzi Khân*," p. 380.



eye of the law is disqualified from entering into any legal transactions (*tassurufât-i-shariyèh*) and is consequently incompetent to contract a marriage. Like the English common law, however, the Mahommedan law makes a distinction between a contract made by a minor possessed of discretion or understanding (a *sarîr*), and one made by a child who does not possess understanding (a *saghîr*). A marriage contracted by a minor who has not arrived at the age of discretion, or who does not possess understanding, or who cannot comprehend the consequences of the act, is a mere nullity.

The Mahommedan law fixes no particular age when discretion should be presumed. Under the English law, however, the age of seven marks the difference between want of understanding in children and capacity to comprehend the legal effects of particular acts. The Indian Penal Code also has fixed the age of seven as the period when the liability for offences should commence. It may be assumed, perhaps not without some reason, that the same principle ought to govern cases under the Mahommedan law; that is, when a contract of marriage is entered into by a child under the age of seven, it will be regarded as a nullity.*

It is otherwise, however, in the case of a marriage contracted by a *sarîr*. "It is valid," says the "*Fatâwa*," "though dependant for its operation on the consent of the guardian."†

* Comp. Bishop on Marriage and Divorce (3rd Ed.), s. 194.

† 1 "*Fatâwa-i-Alamgîrî*," p. 377. The "*Fatâwa*" calls the minor *sabi-ul-âkil*.



A contract entered into by a person who is insane is null and void, unless it is made during a lucid interval.

A slave cannot enter into a contract of marriage without the consent of his master. The Mussulman lawyers therefore add freedom (*hurriyet*) as one of the conditions to the capacity for marriage.

Majority is presumed, among the Hanafis and the Shiahs, on the completion of the fifteenth year, in the case of both males and females, unless there is any evidence to show that puberty was attained earlier.

In the case of *Shamsunnissa v. Ashruffunnissa and others*, it was held by the Sudder Court of Calcutta that the declaration of a girl that she was adult, when there was nothing in her appearance to lead to the contrary conclusion, would be accepted to establish majority.*

Besides puberty and discretion, the *capacity to marry* requires that there should be no legal disability or bar to the union of the parties;† that, in fact, they should not be within the *prohibited degrees*, or so related to or connected with each other as to make their union unlawful.

The Legal Disabilities to Marriage (Asbab-ut-Tahrîm).‡

The prohibitions against certain kinds of marriage are more numerous in the Mussulman law than in the

* See 1 "Morley's Digest," p. 303.

† 1 "Fatâwa-i-Alamgîrî," p. 378; "Irshâd-i-Allâmah;" "Jâma-ush-Shattât."

‡ 1 "Fatâwa-i-Alamgîrî," p. 385; 1 "Fatâwa-i-Kâzi Khân," p. 380; "Sharâya," p. 263; "Mafâtih."



"Code Civil," but they present, in the main, the same features as the French and English law with respect to the prohibited degrees.

The prohibitions may be divided into four heads, viz., *relative* or *absolute*, *prohibitive* or *directory*.

They arise in the first place from legitimate and illegitimate relationship of blood (*consanguinity*);* secondly, from alliance or affinity (المصاهرة *al-musáherèt*);† thirdly, from fosterage (الرضاع *er-Razá*); and, fourthly, from *completion of number*.

According to Caussin de Perceval the ancient Arabs permitted the union of stepmothers and mothers-in-law on one side, and stepsons and sons-in-law on the other.‡ The Koran expressly forbade this custom. "Marry not women," says the Koran, "whom your fathers have had to wife (except what is already past), for this is an uncleanness, an abomination, and an evil way."§ Then come the more definite prohibitions: "Ye are forbidden to marry your mothers, your daughters, your sisters,|| and your aunts, both on the father's and on the mother's side; your brothers' daughters and your sisters' daughters; your mothers who have given you suck, and your foster-sisters;

* The cause of prohibition (تعريم النسب) arising from consanguinity. "Sharāya," p. 266; 1 "Fatāwa-i-Alamgīri," p. 385; (*al-Mahramāt bin-nasab*).

† *Ibid.*, p. 386, حمة المصاهرة.

‡ 1 "Hist. des Arabes," p. 351.

§ Koran, chap. iv., v. 27.

|| Among the ancient Egyptians and Persians such marriages were allowed.



your wives' mothers; your daughters-in-law born of your wives with whom ye have cohabited."
"Ye are also prohibited to take to wife two sisters (except what is already past), nor to marry women who are already married."

The prohibitions founded on consanguinity (the *Tahrîm-un-nasab*) are the same among the Sunnis as among the Shiahhs. No marriage can be contracted (a) with the ascendants, (b) with the descendants, (c) with relations of the second rank, such as brothers and sisters or their descendants, (d) with paternal and maternal uncles and aunts. Nor can a marriage be contracted with a natural offspring or his or her descendants.

Among the Shiahhs, marriage is forbidden for fosterage in the same order as in the case of *nasab*. The Sunnis, however, permit marriage in spite of fosterage in the following cases:—(1) The marriage of the father of the child, with the mother of his child's foster mother; (2) with her daughter; (3) the marriage of the foster-mother with the brother of the child whom she has fostered; (4) the marriage with the foster-mother of an uncle or aunt. The relationship by fosterage arises among the Shiahhs when the child has been really nourished at the breast of the foster-mother.*

* Among the Shiahhs, it is required that the child should have been suckled at least fifteen times, or at least a day and night; among the Hanafis it is enough if it have been suckled only once; among the Shâfeis it is necessary that it should have been suckled four times.



There is no difference among the Sunnis and the Shiahhs regarding the prohibitions arising from alliance.*

Under the Shiah law, a woman against whom a proceeding by *Laân* has taken place on the ground of her adultery, and who is thereby divorced from her husband cannot under any circumstance remarry him.† The *Shafeïs* and *Mâlikîs* agree in this opinion with the Shiahhs. The *Hanafîs*, however, allow a re-marriage with a woman divorced by *Laân*.‡

The Shiahhs, as well as the *Shâfeïs*, *Mâlikîs*, and *Hanbalîs*, hold that a marriage with a woman who is already pregnant (by another)§ is absolutely illegal. According to the "*Hedâya*," however, it would appear that *Abû Hanîfâ*, and his disciple *Mohammed*, were of opinion that such a marriage was allowable.|| The practice among the Indian *Hanafîs* is variable. But generally speaking, such marriages are regarded with extreme disapprobation.

Among the *Shâfeïs*, *Mâlikîs*, and *Hanbalîs* marriages are prohibited during the state of *Ihrâm* (pilgrimage to Mecca) so that when a marriage is contracted by two persons either of whom is a follower

* Some Shiahhs think that the niece of a wife may be validly married with the consent of the wife. But this union is considered invalid by the majority of this sect as well as by the Sunnis.

† "*Sharâya*."

‡ 1 "*Fatâwa-i-Alamgîrî*," p. 548.

§ *Koran*, chap. ii.

|| 1 "*Hed.*," p. 89. *Abû Yusuff*, disagreeing with them, holds that such marriages are invalid, and the "*Hedâya*" adds, that unions of this nature are invalid "by general assent, if the descent of the unborn child is known or established."



of the doctrines of the above-mentioned schools whilst on the pilgrimage, it is illegal. The Hanafis regard such marriages to be legal.* With the Shiah, though a marriage in a state of *Ihrâm* is, in any case, illegal, the woman is not prohibited to the man always, unless he was aware of the illegality of the union.†

All the schools prohibit contemporaneous marriages with two women so related to each other that, supposing either of them to be a male, a marriage between them would be illegal.

Illicit intercourse between a man and a woman, according to the Hanafis and the Shiah, prohibits the man from marrying the woman's mother as well as her daughter.‡

The observant student of the law of the two principal sects which divide the world of Islâm, cannot fail to notice the distinctive peculiarity existing between them in respect to their attitude to outside people. The nations who adopted the Shiah doctrines never seem to have come into contact with the Christian races of the West to any marked extent, whilst their relations with the Mago-Zoroastrians of the East were both intimate and lasting. The Sunnis, on the other hand, seem always to have been more or less influenced by the Western nations. In consequence of the different positions which the followers of the two sects occupied towards non-Moslems, a wide divergence exists between the Shiah and Sunni schools of

* 1 "Hed." Bk. ii. chap. i. † "Jâma-ush-Shattât."

‡ The Shâfeis differ from the Hanafis on this point.



law regarding intermarriages between Moslems and non-Moslems. It has already been pointed out that the Koran, for political reasons, forbade all unions between Mussulmans and idolators. It said in explicit terms, "Marry not a woman of the Polytheists (*Mushrikîn*) until she embraces Islâm." But it also declared that "such women as are *Muhsinas* (of chaste reputation) belonging to the scriptural sects," or believing in a revealed or moral religion, "are lawful to Moslems."

From these and similar directions two somewhat divergent conclusions have been drawn by the lawyers of the two schools. The Sunnis recognise as legal and valid a marriage contracted between a Moslem on one side and a Hebrew or a Christian woman on the other.* They hold, however, that a marriage between a Mussulman and a Magian or a Hindoo woman is invalid. The *Akhbârî* Shiahs and the *Mutazalas* agree with the Sunni doctors. The *Usûlî* Shiahs do not recognise as legal a permanent contract of marriage between Moslems and the followers of any other creed. They allow, however, temporary contracts extending over a term of years, or a certain specified period, with a Christian, Jew, or a Magian female.*

* 1 "Hed.," p. 85; 1 "Fatâwa-i-Alamgîrî," p. 398. Abû Hanîfa permits a Mussulman to marry a Sabeian woman, but Abû Yusuff and Mohammed and the other Sunni-Imâms hold such unions illegal. A Moslemah cannot under any circumstance marry a non-Moslem.

* "Mafâtîh;" "Sharâya," p. 274. According to the Shiahs, Mago-Zoroastrianism is one of the revealed religions.



Both schools prohibit a Mahommedan from marrying an idolatrous female, or one who worships the stars or any kind of fetish whatsoever.

These prohibitions are relative in their nature and in their effect. They do not imply the absolute nullity of the marriage. For example, when a Mahommedan marries a Hindoo woman in a place where the laws of Islâm are in force, the marriage only is invalid and does not affect the status of legitimacy of the offspring.*

The Form of Marriage.

There are several other conditions laid down in the Mussulman law works for the contractual performance of marriage, all of which when properly considered resolve themselves to a mere question of form. For example, it is required (a) that the parties to the contract "should hear each other's words," that is, the conditions of the contract should be understood by both; (b) that, if *sui juris*, they should actually consent to the contract; and (c) that the husband and wife should be distinctly specified, so that there should be no doubt as to their identity.† Regarding these

* The Mogul Emperors of Dehli frequently married Hindoo ladies, who continued to follow their own creeds even after their marriage. The children of these unions were considered legitimate, and often succeeded to the throne in preference to the children of the Moslem wives.

1 "Fatawa-i-Alamgîrî," p. 392. A Mussulman domiciled in England can enter into a valid contract of marriage with an "adolatress"; see *ante*, p. 136.

† "Fatawa-i-Alamgîrî," pp. 377, 378, and 381; "Sharâya," p. 263.



formal conditions the Sunnis and the Shiahhs are agreed, but whilst the former insist that the declaration and acceptance "should take place at one and the same meeting," and that "the acceptance should not be discrepant from the declaration," the latter hold that "it is not a condition that the acceptance should *verbally* agree with the declaration."*

Under the Sunni law, it is also a condition that there should be witnesses present to attest the conclusion of the contract. Under the Shiah law, "the presence of witnesses is not necessary in any matter regarding marriage; and if a marriage were contracted by the spouses themselves or their guardians in private, it would be valid; even if there were an *injunction* to secrecy, that would not invalidate it."†

The law appoints no specific ceremony for the celebration of a marriage; and as it is not regarded as a sacrament by either of the schools, no religious rites are necessary for the contraction of a valid marriage.

Local Forms.

In India, as well as in other Mahommedan countries, many local forms have become associated with the performance of the matrimonial contract. The validity or invalidity of a marriage does not depend

* "Jamâ-ush-Shattât;" "Mafâtih;" "Sharâya," p. 262.

† "Sharâya," p. 262; Shama Churn Sircar's Lectures, vol. ii. p. 328.



in any way on the performance or not of the forms and ceremonies that have been engrafted on Moslem manners and customs by contact with outside races.

Legally, a marriage contracted between two persons possessing the capacity to enter into the contract, is valid and binding, if entered into by mutual consent, in the presence of two witnesses. The Shiah law even dispenses with the latter provision.

“When a man,” says the “Sharâya,” “has declared himself to be the husband of a woman, and she has assented to the truth of the declaration, or when a woman has declared herself to be the wife of a man, and he has acquiesced therein, they are adjudged to be ostensibly married.”*

It may be stated as a general principle that a Mahommedan marriage requires no particular or formal rites to constitute it valid in law; that a marriage is legal and binding if celebrated *per verba de præsenti*.

In consequence, however, of the ceremonies practised in India, it is usual to find two *distinct local* forms existing side by side. The first is the *urfi* (customary) form; the second the *sharâi* (or strictly legal form). The *urfi* marriage is celebrated among the Shiahs and the Sunnis with elaborate ceremonies, similar to those practised in Turkey, and described with so much particularity by D’Ohsson. The *sharâi* marriages require no ceremonies (the

* Compare the cases cited in the “Jâma-ush-Shattât.”



rusûmât (رسومات). In the *sharai* form of marriage, the simple directions of the law are only complied with.

As the terms *urfî* and *sharai* occur frequently in cases where the legitimacy of a child is in dispute or the fact of its mother's marriage is questioned, it is necessary to bear in mind the difference between these two forms of marriage. At the same time it must not be forgotten that as far as the legal consequences of a marriage are concerned, it is equally valid whether it is celebrated in the *urfî* or in the *sharai* form. Of course, in the case of an *urfî* marriage, the publicity with which the rites are performed ensures the probability of satisfactory evidence forthcoming at any time, should a dispute arise regarding the *factum* of the contract. In a *sharai* form, on the contrary, the legal forms only are complied with, and consequently there is little publicity; and therefore, when it becomes necessary in such cases to produce reliable testimony of the marriage, the task is by no means so easy as in the *urfî* form, unless the marriage has been registered.*

* Under the Mahommedan Marriage Registration Act, which is in force in some parts of Bengal, it is optional with the parties or their guardians to register the marriage. At the time the Bill was about to be passed into law, the author pressed on the authorities the advisability of making the registration compulsory, but other counsels prevailed. It has since been acknowledged that great difficulties arise in the administration of justice from the permissive character of the Act. In Algiers, registration is compulsory.



First marriages, even among the poorer classes, are frequently solemnised in the *urfî* form.†

In India, there is little difference between the rites that are practised at the marriage ceremonies of the Shiahhs and the Sunnis. All marriages commence with betrothal (*mangnî*) which extends over years, months, or weeks, as the case may be. They may take place between minors as well as between grown up people.

Marriages are celebrated, generally speaking, in the house of the bride's father or guardian, in the presence of the agents (*wakîls*), if any, of the parties, and the guests, some of whom become witnesses to the deed of marriage. In this document are embodied all the conditions to which the husband binds himself, together with the amount of the antenuptial settlement, the nature of its payment, questions regarding the custody of the children, and other cognate matters. It is attested by the *walîs* (guardians), the *wakîls* (agents), if any, of the bride and the bridegroom and the witnesses. The absence of a deed formally embodying the terms of the marriage-contract is an unusual circumstance in respectable families, especially in the case of a first marriage or when both the parties belong to the same rank or occupy the same position in life. The document is called a *Kâbîn-nâmêh*.

† It must be added, however, that the *Urfî* form is gradually falling into disuse, owing to the extravagance and waste connected with it.



Practically, as stated before, there is little or no difference between the ceremonials (*rusûmât*) observed by the Shiahhs and the Sunnis on these occasions. Theoretically, however, there is a difference which ought not to be lost sight of in dealing with the question of *form*. Whilst the Sunnis simply *recommend* the use of the *Khutbah* before the contract is finally executed, and of the *Surât-ul-Fâtiah* (the opening chapter of the Koran) at the conclusion of the marriage, the Shiahhs consider the use of these to be, to some extent, obligatory.

Among them, the ceremony commences as well as concludes with a prayer, and after the *Sighèh** has been pronounced, the person who officiates as minister or priest, reads the *Khutbah* and the *Sârat-ul-Fâtiah* to sanctify and bless the union.

"Marriage is contracted," says the (Sunni) "*He-dâya*," "by means of declaration and consent, both expressed in the preterite."† Under the Shiah law, however, it is not absolutely necessary that both parties should use the past tense. As long as the

* The *sighèh* is common to both Sunnis and Shiahhs. It is the oral declaration of the engagement, and is pronounced in words almost sacramental in their character on the completion, or conclusion of the ceremony, to mark it as irrevocable.

† 1 "*Hed*." (Eng. Transl.), p. 72. "There are only two tenses in the Arabic verb, the preterite and the aorist. The latter being employed to express present and future time, is ambiguous, and the preterite is commonly used in contracts, for though its proper function is to relate to the *past*, it is employed in law in a creative sense, to meet the necessity of the case."



acceptance is a natural consequence of the proposal or declaration, and sufficiently expresses the intention of the consenting party, it is valid in law.*

Declaration, in the language of the law, signifies the proposal made by one of the contracting parties, and *consent* the acceptance of the declaration by the other.†

Among the Sunnis, marriage may be contracted by the use of the words *nikâh* or *tazwîj* (marriage) which are express in their meaning; or of the terms *hibah* (gift), *tumlik* (appropriation), or *bai* (sale) which convey the sense of the intended matrimonial contract implicatively.‡

The Shiahs on the contrary hold that a valid marriage can only be contracted by the use of the words *nikâh* or *tazwîj* (both of which imply exclusively matrimony). They declare all marriages contracted by the use of any other expression as *invalid*.§ But when a marriage has been contracted by the expressions recognized as illegal under the Shiah law, and has been consummated, the law attaches to it all the incidents and liabilities of a marriage validly contracted.||

Both Sunnis and Shiahs agree in holding that a

* "Sharâya," p. 262; "Jâma-ush-Shattât."

† Comp. 1 "Fatâwa-i-Kâzi Khân," p. 368—

النكاح ينعقد بلفظ النكاح والتزويج كان علي وجه الضرع
الماضي نحو ان تقول المرأة زوجت نفسي منك بكذا بمضمر من
الشهود فيقول الرجل قبلت *

See also 1 "Fatâwa-i-Alamgirî," p. 381.

‡ *Ibid.*, p. 383.

§ "Sharâya-ul-Islâm," p. 262; "Mafâtih."

|| "Jâma-ush-Shattât."



marriage cannot be contracted by the use of the expressions *Ijāra* (lease) or *ariyèt* (loan).^{*} Usufructuary marriages (*nikāh-ul-mutat*) are absolutely void *ab initio*.[†]

The *declaration* and *acceptance* (or, in other words, proposal and consent) may be expressed in any language known to the parties.[‡]

Under the Sunni law it is required that the declaration should precede the acceptance, in order to demonstrate conclusively the intention of the parties.[§]

Under the Shiah law, however, it is not necessary that the declaration should precede the acceptance.^{||}

As marriage is contracted by speech, so also it may be contracted in the case of the dumb by signs, when the signs convey their meaning intelligibly.[¶]

According to all the schools the bridegroom is entitled to see his wife before the marriage,^{**} but Eastern customs very rarely allow the exercise of this right, and the husband, generally speaking, sees his wife for the first time when leading her to the nuptial chamber. In

^{*} In pre-Islāmic times these constituted lawful marriages. Hence the prohibition. Cato's example shows that *nikāh-i-ariyèt* was not unknown to the Romans.

[†] 1 "Fatāwa-i-Alamgīrī," p. 398.

[‡] "Mafātīh;" 1 "Fatāwa-i-Alamgīrī," p. 382.

[§] See 1 "Fatāwa-i-Alamgīrī," p. 382; 1 "Fatāwa-i-Kāzi Khān," p. 379; "Fusūl-i-Imādiyah."

^{||} "Jāma-ush-Shattāt;" "Sharāya," p. 262.

[¶] *Ibid.*

^{**} "Durr-ul-Mukhtār," p. 196; Perron, "Femmes Arabes," pp. 525-530.



order to obviate the drawbacks which naturally spring from the restrictions imposed by oriental manners on social intercourse between the two sexes custom has devised the institution of *mushattās* who serve as intermediaries and help in bringing together the families of the future bride and bridegroom. These *mushattās* arrange the visits of the members of the two families to each other, settle the outlines of the marriage settlement and the *paraphernal* accessories, discover the fortune and means of the parties, and act generally as agents on behalf of the people interested in the arrangement.

Consent.

No contract can be said to be complete unless the contracting parties understand its nature and mutually consent to it. A contract of marriage also implies mutual consent; and when the parties see one another, and of their own accord, agree to bind themselves, both having the capacity to do so, there is no doubt as to the validity of the marriage. Owing, however, to the privacy in which Eastern women generally live, and the difficulties under which they labour in the exercise of their own choice in matrimonial matters, the Mahomedan law, with somewhat wearying particularity, lays down the principles by which they may not only protect themselves from the cupidity of their natural guardians, but may also have a certain scope in the selection of their husbands.

For example, when a marriage is contracted on behalf of an adult person of either sex, it is an essen-



tial condition to its validity that such person should consent thereto; or, in other words, marriage contracted without his or her authority or consent is null, by whomsoever it may have been entered into.*

Among the Hanafîs and the Shiahhs the capacity of a woman who is adult and sane to contract herself in marriage is absolute.

The Shiah law is most explicit on this point. It expressly declares that in the marriage "of a discreet female (*rashîdah*, who is adult) no guardian is required." The "Hedâya" holds the same opinion: "A woman," it says, "who is adult and of *sound mind*, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians, and this, whether she be a virgin or *saïbbah*."†

Among the Shâfeis‡ and the Mâlikîs, although the consent of the *adult virgin* is as essential to the validity of a contract of marriage entered into on her behalf, as among the Hanafîs and the Shiahhs, she

* 1 "Fatâwa-i-Alamgîrî," p. 405; 1 "Fatâwa-i-Kâzi Khân," p. 481; "Sharâya-ul-Islâm," pp. 262, 263.

† 1 "Hed." (Eng. Trans.), p. 95.

‡ The Borahs and Maimans (Memons) of Bombay are for the most part Shâfeis (see Introduction). The Khojahs, followers of Aga Khân, are Ismailîs, and are governed by their own special customs, which diverge widely from the positive directions of the Mahommedan law, but have much in common with Hindoo laws and customs; see the interesting judgments of the Bombay High Court in the case of *Shirji Hasam v. Datu Madji Khoja* and *Hirbai v. Gorbai*, 12 "Bombay High Court Reports," pp. 281 and 294, respectively.



cannot contract herself in marriage without the intervention of a *wali*.

Among the Shâfeïs, a woman cannot personally *consent* to the marriage. The presence of the *wali* or guardian is essentially necessary to give validity to the contract. The *wali's* intervention is required by the Shâfeïs and the Mâlikîs to supplement the presumed incapacity of the woman to understand the nature of the contract, to settle the terms and other matters of a similar import, and to guard the girl from being victimised by an unscrupulous adventurer, or from marrying a person morally or socially unfitted for her.

It is owing to the importance and multifariousness of the duties with which a *wali* is charged, that the Sunni law is particular in ascertaining the order in which the right of *wilâyet* is possessed by the different individuals who may be entitled to it.

The schools are not in accord with reference to the order. The Hanafis entrust the office first to the agnates in the order of succession; then to the mother, the sister, the relatives on the mother's side, and lastly to the Kazi.

The Shâfeïs adopt the following order:—the father, the father's father, the son (by a previous marriage), the full brother, the consanguinous brother, the nephew, the uncle, the cousin, the tutor, and lastly the Kazi, thus entirely excluding the female relations from the *wilâyet*.

The Mâlikîs agree with the Shâfeïs in confiding the



office of *walî* only to men, but they adopt an order slightly different. They assign the first rank to the sons of the woman (by a former marriage,) the second to the father; and then successively to the full brother, nephew, paternal grandfather, paternal uncle, cousin, manumittor, and lastly to the Kazi.

Among the Mâlikîs and the Shâfeîs where the presence of the *walî* at a marriage is always necessary, the question has given birth to two different systems.

The first of these considers the *walî* to derive his powers entirely from the law. It consequently insists not only on his presence at the marriage, but on his actual participation in giving the consent. According to this view, not only is a marriage, contracted through a more distant *walî*, invalid whilst one more nearly connected is present, but the latter cannot validate a marriage contracted at the time without his consent, by according his consent subsequently.

This harsh doctrine, however, does not appear to be enforced in any community following the Mâlikî or Shâfeî tenets.

The second system is diametrically opposed to the first, and seems to have been enunciated by Shaikh Ziâd as the doctrine taught by Mâlik.

According to this system the right of the *walî*, though no doubt a creation of the law, is exercised only in virtue of the power or special authorisation granted by the woman; for the woman once emancipated from the *patria potestas* is mistress of her own



actions. She is not only entitled to consult her own interests in matrimony, but can appoint whomsoever she chooses to represent her and protect her legitimate interests. If she think the nearer *walî* inimically inclined towards her, she may appoint one more remote to act for her during her marriage. Under this view of the law the *walî* acts as an attorney on behalf of the woman, deriving all his powers from her and acting solely for her benefit.*

This doctrine has been adopted by Al-Karkhî, Ibu al-Kâsim, and Ibn-i-Salamûn, and has been formally enunciated by the Algerian Kâzis in several consecutive judgments.

When the *walî* preferentially entitled to act is absent and his whereabouts unknown, when he is a prisoner or has been reduced to slavery, or is absent more than ten days' journey from the place where the woman is residing, or is insane or an infant, then the *wilâyet* passes to the person next in order to him.

The Hanafîs hold that the woman is always entitled to give her consent without the intervention of a *walî*.† When a *walî* is employed and found acting on her behalf, he is presumed to derive his power

* Mohammad Assem, "Traité de Mariage," Traduction de B. Lasalle, chap. ii.; "Kitâb-ul-Anwâr;" 1 "Hed.," Bk. ii., chap. ii. "Mâlik and Shâfeî assert," says the "Hedâya," "that a woman can by no means contract herself in marriage to a man in any circumstance, whether with or without the consent of her guardians (*walis*). Neither is she competent to contract her daughter or slave nor to act as a matrimonial agent for anyone."

† 1 "Fatawa-i-Alamgîrî," p. 405.



solely from her, so that he cannot act in any circumstances in contravention of his authority or instructions.*

When the woman has authorised her *walî* to marry her to a particular individual, or has consented to a marriage proposed to her by a specific person, the *walî* has no power to marry her to another.

Under the Shiah law, a woman who is "adult and discreet" is herself competent to enter into a contract of marriage. She requires no representative or intermediary through whom to give her consent. "If her *guardians*,"† says the "*Sharâya*," "refuse to marry her to an equal when desired by her to do so, there is no doubt that she is entitled to contract herself even against their wish."‡

The Shiahs agree with the Hanafîs in giving to females the power of representing others in matrimonial contracts. "In a contract of marriage full regard is to be paid to the words of a female who is adult and sane, that is, possessed of sound understanding; she is, accordingly, not only qualified to contract herself, but also to act as the agent of another in giving expression either to the declaration or to the consent."§

The "*Mafâthh*" and the "*Jâma-ush-Shattât*" also

* 1 "*Fatawa-i-Kâzi Khân*," p. 380.

† Viz. the father and the grandfather, who under the Shiah law are the *only walî jābir*.

‡ "*Sharâya*," p. 263.

§ "*Sharâya*," p. 266.



declare that "it is not requisite that the parties through whom a contract is entered into, should both be males, since with us (the Shiah) a contract made through (the agency or intermediation of) a female is valid."

To recapitulate. Under the Mâlikî and Shafeî law, the marriage of an adult girl is not valid unless her consent is obtained to it, but such consent must be given through a legally authorised *walî*, who would act as her representative. Under the Hanafî and Shiah law, the woman can consent to her own marriage, either with or without a *walî*.*

Express or Implied Consent.

The consent may be given either in express terms or by implication. In the case of a girl who has been once married or is aware of the nature of the matrimonial contract,† the consent is required to be *express*. When this is not the case, or, in other words, when the girl is a virgin, the jurists of all the schools hold that "smiling, laughing, or remaining silent, must be construed to imply consent."‡

* "When a girl is adult and discreet, no one has a right to be her guardian, but it is nevertheless becoming and proper for her to authorise her father or grandfather to settle the terms of the contract for her. If she have no father or grandfather, it would be well for her to appoint her brother to act on her behalf."—*"Jâma-ush-Shattât."*

† *Saib* signifies a girl who is not a virgin.

‡ "In the case of a virgin, the assent is inferred from her silence when the matter is propounded to her; but a woman who



"When a father consults his daughter before marriage," says the "Fatâwa-i-Alamgîrî," "and says to her, 'I am going to contract you in marriage,' and does not mention the dower or the name of the husband, and she remains silent, silence is not consent in such a case, and she may afterwards repudiate the marriage." *

The consent is not valid if given when the woman is suffering from a serious illness likely to endanger life. This point was decided by the superior tribunal of Algiers on the 9th of November 1836.

In that case it appeared that one Al-Taïb married a woman of the name of Zuhra, who was at the time in an advanced stage of consumption. The woman, in fact, died four months after the marriage. Upon a suit by Al-Taïb to establish his rights as husband in

is not a virgin must be put to the trouble of expressing her assent by actual speech."—"Sharaya," p. 265.

"When the guardian, *being the person empowered to engage in the contract*, requires the consent of an adult virgin to a marriage, if she smile or remain silent, this is compliance; because the Prophet has said, 'a virgin must be consulted in everything which regards herself; and if she is silent it signifies assent;' and also because her assent is rather to be supposed as she is ashamed to testify her wish. And laughter is a still more certain token of assent than silence; contrary to weeping, which expresses abhorrence. . . . Some have said that if the laughter be in the nature of jest or derision, it is not compliance."—1 "Hed." p. 97 (Engl. Trans.) 1 "Fatâwa-i-Alamgîrî," p. 408.

* 1 "Fatâwa-i-Alamgîrî," p. 406. If an adult virgin is married by any person other than the father, brother, or uncle, her consent is required in express words; 1 "Hed." p. 96 (English Trans.).



respect of the property left by Zuhra, the Majlis-i-Kazâ of Algiers made a decree in his favour. On appeal, however, the Kâzi's order was reversed and the marriage was pronounced invalid.

It has been doubted by M. Bourdens Lasalle whether the mere proposal and consent in the presence of witnesses constitute the formal marriage, or whether it ought not to be regarded simply as a betrothal. There can be no doubt that, under the Mahommedan law, a marriage, according to all the schools, is legally complete, when *consent* has been given in response to the proposal.

The institution of *mangni* or betrothal, though it exists in India, is not legally binding on either side. A marriage engagement which has not been completed by the actual *akd*, and when the *sighêh* has not been pronounced, cannot be enforced.

An action for breach of promise cannot lie, therefore, under the Mahommedan law. It is only after the *akd* has been performed and the contract actually executed, that a suit can lie on behalf of either of the married parties for restitution of conjugal rights.

Testimony.

Under the Shiah law, the validity of a marriage does not depend on the presence of witnesses, whilst under the Sunni law it is a necessary condition.* Not only

* 1 "Fatawa-i-Alamgîrî," p. 379.



must they be present at the time of the execution of the contract, but they must know of its actual terms. They must also be able to speak to the identity of the persons from whom the proposal and consent emanated. If a woman were so concealed or veiled that neither of the witnesses could recognise her, and were not able to tell whether she or any other female in the room gave the consent, their testimony would be insufficient.

The time when the presence of the witnesses is required, is when the contract is being actually entered into, *viz.* when the proposal is made and the consent is given. It is a further condition," says the "Fatâwa," "that the witnesses should hear the words of both the contracting parties. . . . If the witnesses should hear the words of one of them and not of the other, the marriage is not lawful. So also if both the witnesses should hear both the parties, but hear them separately."* Nor is a contract of marriage sufficiently binding in law when it is made in the presence of persons who, though hearing the contracting parties, are yet ignorant of the meaning of their words or do not understand their language.

The condition of testimony is not, however, so essential a condition that it cannot be dispensed with, and should a marriage be contracted in a country where the Sunni condition of testimony could not be

* 1 "Fatâwa-i-Alamgiri," p. 378; "Fusûl-i-Imâdiyyah."



complied with, it would not be invalid. It is only when testimony is available and marriage is contracted without it that the contract is held to be invalid. But even then the defect is cured by consummation.

“There are four conditions requisite to the competency of witnesses, viz. freedom, sanity, majority and *Islâm*.”* But when the husband is a Moslem and the wife a non-Moslemah, the marriage may be contracted in the presence of two non-Moslems, belonging to her faith or any other faith, provided they do not labour under any legal disability.†

In marriage, under the Sunni law, it is not necessary that the witnesses should bear an irreproachable character. The testimony, accordingly, of persons who have been accused of any crime or who have suffered (المعرودين) punishment for delicts, such as slander, adultery, or fornication, is admissible. The deaf are not competent witnesses as they are incapable of hearing the words of either party. The Hanafis admit the testimony of the blind.‡

* 1 “*Fatâwa-i-Alamgîrî*,” p. 377. This exclusiveness is not confined to Mussulmans. Lord Coke declared that an “infidel” was not a competent witness, on the ground that “all infidels were in law perpetual enemies, for between them, as with the devil whose subjects they are, there is perpetual hostility and can be no peace.”

† “*Fusûl-Imâdiyyah*,” 1 “*Fatâwa-i-Alamgîrî*,” p. 377; 1 “*Fatâwa-i-Kâzi Khân*,” p. 380.

ويجوز نكاح المسلم اللميه بشهادة اللميين

“*Kâzi-Khân*.”

‡ 1 “*Fatâwa-i-Kâzi-Khân*,” p. 380; 1 “*Fatâwa-i-Alamgîrî*,” p. 377.



Among the Shâfeîs and the Hanafîs, the testimony of two men or of one man and two women is considered sufficient, but no marriage can be celebrated in the presence of females alone.* The Mâlikîs insist that all the witnesses should be males.

Although the law requires the presence of two witnesses only, if of the male sex, and the early caliphs always contracted marriages strictly in accordance with the requirements of the law, it is rare to find among Mussulmans, especially in India, nuptials celebrated so unostentatiously that more than two witnesses are not present.†

According to both the Shiahs and the Sunnis, a proposal of marriage may be made by proxy or by letter. But when it is made by letter, it is necessary, under the Sunni law, that the woman should give her consent in the presence of two witnesses who have seen the letter delivered and are aware of its contents.‡

In the same way when a proposal is made by proxy, the witnesses should hear the message delivered and the consent given. The proxy or the messenger need not be an adult person.§

* 1 "Hed." (Engl. Trans.), p. 74; 1 "Fatâwa-i-Kâzi Khân," p. 380; 1 "Fatâwa-i-Alamgîrî," p. 378.

† The Shiahs whilst holding that a marriage may be contracted in private without witnesses, enjoin the preservation of testimony to avoid disputes; "Jâma-ush-Shattât."

‡ 1 "Fatâwa-i-Alamgîrî," p. 380; 1 "Fatâwa-i-Kâzi Khân," pp. 381, 382.

§ *Ibid.*

*Agents.*

Marriages may be contracted among the Sunnis and the Shiahhs through the agency of *wakîls*. For their appointment witnesses are not necessary, and their powers are governed by the same rules of law as apply to other contracts. If two persons are appointed to act jointly, neither of them can act independently of the other. Should an agent exceed his authority, a contract entered into by him is not valid until ratified by the principal. It is illegal for an agent to contract the principal (if she be a female) to himself or to any of his own relations, unless empowered to that effect by the woman herself. The same rule applies to a woman who acts as agent for a man. She cannot contract him in marriage to any of her own relations unless specifically authorised. If a marriage agent act *mala fide* towards his principal, or prejudicially to the interests of such principal, by marrying her to a slave, an eunuch, a lunatic, &c., the marriage is invalid.*

An unauthorised person (*fazûlî* فضولي) may enter into a contract of marriage for another, but it is not valid until ratified by the parties concerned.

Under the Shiah law, every person acting for an adult and discreet girl is a *fazûlî*, unless specially authorised by her.†

* 1 "Fatâwa-i-Kâzi Khân," p. 382; "Jâma-ush-Shattât."
"Jâma-ush-Shattât."

*Conditions of Marriage.*

Though a promise of marriage* has no legal effect under the Mahommedan law, a stipulation after the marriage has taken place, to the effect that it will not be consummated until the lapse of a specified period, is valid in law. Such a stipulation is invariably inserted in contracts of marriage between minors. Conditions of this nature, however, are not needed under the Mahommedan law, inasmuch as a Mussulman husband is not entitled to the custody of his wife's person until she has attained puberty.†

The conditions in a marriage contract may be either legal or illegal. The illegal conditions are those which affect the validity of the marriage and render the contract voidable, unless consummation takes place. When the marriage has been consummated the condition alone is voided.

The condition which limits the duration of the marriage to a specified time is illegal under the Sunni law.‡ Such temporary marriages (*nikâh-i-mawakkat*) were admitted by the pre-Islâmic institutions, and were allowed equally among the Jews and the Arabs at the time the Islâmic laws were promulgated,§ and

* A promise of marriage made by a Mussulman in England would probably give rise to the same legal consequences as though he were an Englishman.

† *In re Khatija Bibi*, 5 "Bengal Law Reports," O. C. J., p. 530.

‡ 1 "Fatâwa-i-Alamgîrî," p. 398.

§ Perron, "Femmes Arabes," p. 171; 2 "Code Rabbinique," p. 232.



instances of such unions were not rare even in Christendom. Three days after Mohammed's entry into Mecca these marriages were forbidden by him as contrary to the Islâmic principles.*

The *Asnâ-asharya* or *Imâmîa* section of the Shiahs admit the validity of temporary marriages (*nikâh-i-mawakkat* or *mutâh*). Among these, the same conditions are necessary for the validity of a temporary as for a permanent marriage (*nikâh-i-dâim*). There is, however, this difference, that whereas in the case of a permanent marriage, the non-mention of dower does not render the contract itself null and void, in a *mutah* marriage it has that effect.†

Under the Sunni law, if a temporary marriage has been contracted and consummation has taken place, the marriage takes effect as a permanent one.

It was customary in pre-Islâmic times for men to arrange to marry their daughters or other female relations reciprocally, "the person of one forming the dower of the other." This form of marriage was called a *nikâh-ush-shigâr* (نكاح الشغار),‡ and was prohibited by Mohammed, according to a *hadis* admitted to be authentic by all the sects. The Shiahs, the Shâfeïs and the Mâlikîs, consider such marriages invalid, un-

* "Bukhârî;" "Mishkat-ul-Masabîh;" 3 "Tab. Gen. de l'Empire Ottoman," p. 58. "A *nikâh-i-mawakkat*, or temporary marriage, where a man marries a woman under an engagement of ten days (for instance) in the presence of two witnesses is null."

—1 "Hed." p. 91 (Engl. Trans.)

† "Mafâtih."

‡ *Shigâr*, suppression.



less consummation has taken place, when the condition of dower is held void, and the *mahr-i-misl* is presumed to be the dower of the woman. The Hanafis regard this form of marriage as valid, *mahr-i-misl** being presumed from the outset.†

Conditions opposed to public morality are illegal and void without touching the validity of the marriage. For example, a condition made to the effect that the husband shall have no right to prevent his wife frequenting immoral places is void. If a woman forego her right to maintenance, the stipulation is of no effect in law, and is equally void.

The legal conditions are the following, among others :—

(a.) That the husband shall not contract a second marriage during the existence or continuance of the first.‡

(b.) That the husband shall not remove the wife from the conjugal domicile without her consent.

(c.) That the husband shall not absent himself from the conjugal domicile beyond a certain specified time.

* See chapter on "Dower."

† 1 "Hed." p. 130 (Eng. Trans.)

‡ Malik Shah (the Seljukian) imposed this condition for the first time on Caliph Mahdi, to whom he gave his daughter in marriage. Von Hammer, "Hist. de l'Empire Ottoman," vol. iii. p. 17. "Târikh-i-Wassâf;" see the case of *Poonoo Bibi v. Fyez Bakhsh*, 15 Bengal Law Reports, App. 5.

Some of the *Asnâ-asharya* doctors are of opinion that this condition is not legal. It would, however, appear that even in Persia, where their doctrines are chiefly in force, this condition is frequently imposed.



(d.) That the husband and the wife shall live in a specified place.

(e.) That a certain portion of the dower shall be paid down at once or within a stated period, and the remainder on the dissolution of the contract by death or divorce.

(f.) That the husband shall pay the wife a fixed maintenance.

(g.) That he shall maintain the children of the wife by a former husband.

(h.) That he shall not prevent her from receiving the visits of her relations whenever she like.

All these conditions being antenuptial agreements, made in consideration of marriage, are valid and enforceable in law.

In order to constitute a legal marriage it is not absolutely necessary to reduce the terms into writing, or to embody the proposal and consent in a formal document. Nevertheless, it has always been recommended that the conditions should be entered in a deed of marriage. The Caliphs, notably Hârûn-ur-Rashîd,* insisted on all Moslems and Zimmis, subjects of the Caliphate, registering their marriages before the Kazis.

In Algeria the deed of marriage is required by law to be registered and a copy kept in the Kazi's *mahkama*.†

* De Sacy, "Chrestomathie," p. 22.

† The Mahommedan Marriage Registration Act is only optional, see *ante* p. 228.



The deed of marriage, called in India the *Kābin nāmāh*, is always placed in the keeping of the woman. The custom of handing the document to the wife or her guardians dates from pre-Islāmic times, and is necessary for the protection of her interests, in countries where no copies of marriage contracts are kept in the public records.

Khilwat-i-Sahîh.

As in many cases invalid marriages are rendered valid by consummation, and as the dower does not become due in its entirety until the marriage has been actually or constructively consummated, the question of consummation forms often an important element in the discussion of the status of marriage.

Under the Hanafî and the Mâlikî law, a presumption of consummation is raised from the retirement of the husband and the wife into the nuptial chamber, under circumstances which lead to the natural inference of matrimonial intercourse. This is what is called *valid retirement* or *Khilwat-i-sahîh*. But when there is some legal, moral, or physical impediment to such intercourse no presumption is raised, and the retirement is not valid.* For example, when the parties are observing the obligatory fast of the Ramzan, or either the husband or the wife is suffering from an illness

* الخلوۃ الصیحة ان یتجمعا فی مکان لیس هناك مانع یمنعہ فی
الوطی حساً وشرعاً وطبعاً *

1 "Fatawa-i-Kâzi Khân," p. 383; 1 "Fatawa-i-Alamgîrî," p. 429.



which prevents connubial relationship, the retirement into the nuptial chamber does not give rise to the presumption of consummation.

In Western Mussulman countries, *Khilwat-i-sahîh* goes by the name of *Bina*.*

Among the Hanafis and the Mâlikîs, the *Khilwat-i-sahîh* has the same character, and gives birth to the same legal consequences as the Hebrew ceremony of leading a bride to the nuptial bed.† It gives completion to the marriage and marks the time when the conjugal rights commence, and assures her entire dower to the wife. "Our masters," says the "Fatâwa-i-Alamgîrî,"‡ "have placed the *Khilwat-i-sahîh* in the same category as actual consummation in respect of certain of its consequences, but not others. They have done so in the matter of confirmation of dower, the establishment of paternity, the observance of probation (*iddat*), (the wife's) right to maintenance and domicile (or lodgment), and the unlawfulness of marriage with her sister."

Under the Shiah as well as under the Shâfeî law

* This word literally means an edifice, and as the ancient Arabs used to erect a special tent to conduct their newly-married wives into, the retirement of the bride and the bridegroom into the nuptial chamber has come to be called by that name. De Sacy, "Anthologie Arabe."

† 1 "Code Rabbinique," p. 167.

‡ صحابنا اقامو الخلوة الصيحة مقام الوطي في حق بعض الاحكام دون البعض فاقاموها مقامه في حق تاكد المهر وثبوت النسب والعدة والنفقة والسكني وحرمة النكاح اختها
1 "Fatâwa-i-Alamgîrî," p. 431.



no presumption arises from simple retirement, actual consummation alone giving rise to the rights and duties which spring from marriage.*

Proof of Marriage.

Marriage may be proved directly or presumptively. Directly by means of the oral testimony of the witnesses present during the marriage, or by documentary evidence in the shape of a deed of marriage.

Marriage may be proved presumptively by the statement of the parties or their general conduct towards each other. "When a person," says the "Fatâwa," "has seen a man and woman dwelling in the same house (*bait*) and behaving familiarly towards each other as husband and wife, it is lawful for him to testify that that woman is the man's wife."†

The Legal Effects of Marriage.

Marriage legalises connubial relationship; it imposes on the husband the obligation of paying the antenuptial settlement and of fulfilling all the antenuptial agreements made in consideration of marriage; it establishes on both sides the prohibition of affinity and the rights of inheritance; it obliges the husband

* 1 "Hed." Bk. ii. chap. iii.; "Kitâb-ul-Anwâr;" "Ikhtilâf-i-Aimmah;" "Jâma-ush-Shattât."

† 1 "Fatâwa-i-Alamgîrî," p. 381; similarly under the Shiah law. See *ante*, p. 227.



to be just towards his wife, to treat her with respect and affection; and exacts from her in return obedience and faithfulness to him.*

* Like the English law, the Sunni law allows the husband a moderate power of correction over a refractory wife. The Shiah law absolutely prohibits a husband to touch his wife in anger. "Jâma-i-Abâsî," "Nail-ul-marâm."



CHAPTER VIII.

ILLEGAL AND INVALID MARRIAGES.—RIGHT OF OBJECTION
POSSESSED BY AWALI.—RIGHT OF OPTION.—CAUSES
FOR WHICH MARRIAGE MAY BE CANCELLED.—EFFECTS
OF APOSTASY ON THE STATUS OF MARRIAGE.

CONNECTIONS which are illegal are null and void *ab initio*, and create no civil rights and obligations between the parties. The wife has no right of dower against the husband, and neither of them is entitled to inherit from the other, in case of death of either, during the period when the contract is supposed to have existed. The illegality of such unions commences from the date when the contracts are entered into, and the marriage is considered as totally non-existing "in fact as well as in law."

Marriages contracted within the degrees prohibited by the Mussulman law fall under the head of marriages which are null and void *ab initio*; they carry no civil rights and produce no legal effect. The ille-



gality of the connection is not altered even by the fact that the marriage was contracted in good faith and in ignorance of the causes which rendered the parties unlawful (*harâm*) to each other. If there be any offspring of such a union, it does not acquire, according to the Hanafî doctrine, the status of legitimacy, though the woman has to observe the customary probation before she can marry again.

Marriages, which are not vitiated and rendered illegal by a radical defect of the character above described, stand on a different footing. In such cases consummation, generally speaking, removes the flaw to the legality of the union. The children conceived and born during the existence of the contract are held to be legitimate, and the wife acquires a right to her dower.

For example, if a man charge two mandataries (*wakîls*) to marry him to a woman, and they acting independently of each other marry him to two sisters, the contract prior in date will be held valid, whilst the other will be voided without the formality of the Kâzî's judgment, or a regular divorce from the supposed husband. When it is impossible to discover which of the two contracts was first entered into, both marriages would be nullified.*

* 1 "Hed." p. 80 (Eng. Trans.); 1 "Fatawa-i-Alamgîrî," p. 392; "Sharâya-ul-Islam," p. 272; "Jâma-ush-Shattât."

When two sisters have been married to one man by one and the same contract, both marriages are void, and the women are not entitled to any dower, if separation has taken place before consummation; should the marriages, however, have been consummated,



A marriage contracted with a woman already married is governed by the same principle of law. When a girl is married to two men successively, to one by her father and to the other by another guardian, or when two men claim to be married to one woman, then the marriage first in date is alone considered legal and regular, and the other is dissolved without divorce or decree. In case, however, it is impossible to discover which of the two contracts is prior in date, then both marriages are held null and void, and the women are not entitled to claim any dower or right of inheritance, if the alleged husband or husbands die. Should the second marriage, however, have been consummated, then on grounds of public morality it will be considered valid.*

Should a man contract a marriage with a woman during her *iddat*, or period of probation, with knowledge of the fact that she was observing the *iddat*, such marriage would be void. After the expiration of the probationary period, he can, however, enter into a contract of marriage with her *de novo*. Should the

then both the women would be entitled to their dowers, in spite of the dissolution of the contracts. If they were married by separate contracts, and it is not known which was married first, both would be entitled to half their dower, if the separation took place before consummation,—but if after, then to their respective dowers in full. When one marriage is consummated and not the other, the one which is consummated will be held valid though posterior in date. Comp. the “*Fusûl-i-Imâdiyah*.”

* Some of the Indian law courts have decided cases in the teeth of this principle.



marriage be consummated during the *iddat*, the "woman's person would become absolutely prohibited to the man." Any child, however, born of the connection would be regarded as legitimate, and the separated woman would be entitled to her dower.*

It is a doubtful point in law whether a man contracting a marriage with a woman in ignorance of her *iddat*† would be absolutely forbidden to cohabit with her. Several cases which have been decided in Algeria serve to show that when a contract has been entered into in good faith, without the parties being aware of the unlawfulness of the act, it is regarded by a liberal interpretation of the Mussulman law, as valid.

Under the Shiah law, if a man commit adultery with a married woman he cannot marry her after the decease of her husband. Her person is "for ever unlawful to him."‡ If he marry her in spite of this prohibition or in ignorance of the rule of law and the

* "Sharâya," pp. 272, 273; comp. 1 "Fatâwa-i-Alâmgîrî," p. 393; "Kanz-ud-Dakâik;" "Fusûl-i-Imâdiyah."

† The extreme solicitude of the Mussulman law with respect to the legitimacy of children, and its aversion to bastardise the spring of lawful or *semblable* unions, has led to the *formulation* of the rule of *iddat*. Every woman separated from her husband and every widow is required to abstain for a specific period from contracting a fresh union, until it is known with certainty whether she is *enciente* or not. In the case of a widow this period is four months and ten days, whereas, in the case of a woman separated from her husband by divorce, it is only three months. This prohibition guards against confusion of parentage.

‡ "Mafâtih."



marriage is consummated, probably the marriage would be allowed to stand.”*

A marriage with a woman who is *enciante* is placed in the same category as a marriage contracted during the period of *iddat*. The illegality of such a marriage is founded on an express direction contained in the Koran, and has frequently been enforced by the Kazi's Courts in Algeria.

On the 13th of July 1864, one of the Kazis of Algiers made the following order†:—“One Bakhta bint Yahya was married to Ahmed bin Bayad on the 14th of April 1864, three months after her separation from her first husband, Abdul Kadir. On the 9th of July 1864, she was delivered of a child. This circumstance came to the knowledge of the Kazi on the 13th of July, who, thereupon, cited Ahmed, the husband, and Yahya, the father of the woman, before him, and learnt from them that the facts were true. He, therefore, declared the marriage between Ahmed and Bakhta to be dissolved and their persons to be forbidden to each other.”‡

The Hanafis do not consider a marriage contracted with a woman who is *enciante*, unless it is known by whom, to be absolutely illegal.

* Comp. the cases in the “Jâma-ush-Shattât.”

† The Kâzi, as the general conservator of law and morality in a Mussulman community, has the power to annul or punish an illegal act, without a formal complaint being preferred before him. See “Fatawa-i-Alamgîrî;” and the “Jâma-ush-Shattât,” “Kitab-ul-Kazâ.”

‡ 1 “Sautayra,” p. 142.



When a man re-marries a woman from whom he has been divorced,* *without her having been married to another man in the interim and separated from him*, such re-marriage is illegal. This rule was prescribed to arrest the scandal of indefinitely repeated divorces and re-marriages which had become frequent in Arab society, and were opposed to the interests of public morality. The violation of this law, therefore, leads to the nullity of the marriage.†

Should the separation, however, have taken place under circumstances giving rise to the inference that both parties, at the time of disagreement had lost their self-control, some lawyers are of opinion an allowance should be made in their favour, and that they should be permitted to re-marry, without the wife having to undergo the disagreeable ordeal of a marriage ceremony with another man.

According to the strictly orthodox doctrines a man may enter into four contemporaneous contracts of marriage.‡ A contract of marriage with a fifth woman is absolutely void; but if the marriage be consummated, though she would be separated

* See chapter on "Divorce."

† The scandalous condition of morality in the Arabian Peninsula, among the Jews, the Christians, and the Pagan Arabs, at the time of Mohammed's advent, is apparent from the prohibition pronounced by him against the re-marriage of a woman to a man who had divorced her three times. This prohibition is preserved in the Shiah law. Comp. "Sharâya," p. 274.

‡ See *Introd.*



from the man, yet she would be entitled to her dower.*

Invalid Marriages.

Invalid marriages are those which are not absolutely illegal or void, and are either invalidated by the decree of the judge or by the action of the parties interested. Consequently, in the case of such marriages the cause of invalidity may be removed, either by the parties themselves or those who stand in *loco parentis* to them.

A marriage contracted by an infant, according to all the schools, is an invalid marriage. When the contract is entered into by a minor possessed of discretion, it is validated by the ratification of the guardian.†

A contract of marriage entered into by an insane person or one who, without being a confirmed lunatic, is labouring under mental hallucinations, is, under the Sunni law, invalid. Its ratification by the guardian or the committee of the *non compos mentis* removes the invalidity.‡

Under the Shiah law the contract has no legal effect and is absolutely void.§

* The *Asna-asharya* or *Imâmî* section of the Shiah school think that besides four wives permanently married, a man may contract several temporary marriages. The Sunnis very rightly repudiate this doctrine as immoral. The Mutazalas agree with the Sunnis.

† 1 "Fatâwa-i-Alamgîrî," p. 377; "Sharâya," p. 262.

‡ 1 "Fatâwa-i-Alamgîrî," p. 402.

§ "Sharâya," p. 262; "Jâma-ush-Shattât;" "Kitâb-min-lâ-Euhazzar-al-Fakîh."



A marriage contracted by a person whilst in a state of intoxication is invalid, according to the Shiah as well as the Sunni law, unless confirmed after the recovery of consciousness.*

A marriage contracted by a person *in extremis* or by one suffering from a disease in which there is imminent danger of death, is invalid. If the disease however, be such that the person recovers from it, and consummates the marriage, the invalidity is removed.†

* "Mafâtiḥ." The "Sharâya," however, makes a distinction between the case of a male and that of a female. A marriage contracted by a drunken man, according to the "Sharâya," is not valid, even though he may ratify it on regaining consciousness; whilst in the case of a female it is held to be otherwise. Consequently, a female who has been induced to consent to her marriage whilst in a state of intoxication, can on becoming conscious ratify the contract and it becomes valid. The opinion of the "Allâmah" given in the "Mafâtiḥ" is the more correct and is supported by the cases cited in the "Jâma-ush-Shattât."

† "A marriage contracted by a sick person (مریض) is dependent on consummation," says the "Sharâya," p. 453, "so that if he die of *that illness* without consummation, the contract is void and the woman has no right to dower or succession." The "Jâma-ush-Shattât" says, "When a contract is entered into by a man suffering from an illness, and he dies of it *after* consummation, or if after recovering from that illness he die of some other disease, then the marriage is valid, and the wife is entitled to her dower as well as to her right of succession." Again, when a woman in health marries a sick man and dies before consummation, the majority of the doctors hold that the husband is entitled to the right of succession in her estate, though there is some difference of opinion. When a woman *in extremis* or suffering from a dangerous illness marries a man in health, who dies without consummating the marriage, the contract is held to be valid, and the wife has a right to her dower and to a share in the inheritance of her deceased



When consent to a contract of marriage has been obtained by force or fraud, such a marriage is invalid, unless ratified after the coercion has ceased, or the duress has been removed, or when the consenting party, being undeceived, has continued the assent.*

Should a person who has made a proposal or declaration subsequently lose his consciousness and understanding (though only for a time), his proposal of marriage would, if accepted, be invalid.†

The right of the father under the Mussulman law to impose the status of marriage on his minor children has been already mentioned. A marriage contracted by the father or the grandfather, who in the absence of the father stands in his place, is *prima facie* supposed to be in the interests of the child. A minor, therefore, contracted in marriage by a father or a grandfather (according to most of the

husband. Though the references given are from Shiah authorities only, it is needless to add that there is very little difference on these points between the Shiahs and the Sunnis.

* From some of the authorities cited in the "Fatawa," it would appear at first sight that if a woman were compelled to marry, against her will, "a man who was her equal and gave a suitable dower," that she has no option after the compulsion has been withdrawn. But a careful collation of *all* the authorities and an analysis of the qualifications attached to this doctrine, which in its bare form is no less astounding than contrary to the rational provisions of the Mahommedan law, leave no room for doubt that the principles given in the text are correct. The Shiah law is very explicit and admits of no doubt.

† "Sharāya," p. 262, 263; "Jāma-ush-Shattāt;" "Irshād-i-Allāmah."



schools),* has no right of option to ratify or cancel the contract of marriage on arriving at puberty, unless the marriage was grossly *unequal* or the dower was fraudulently improper, or one of the parties so contracted was suffering from some incurable disease.†

In consequence of the proviso which qualifies the otherwise unlimited and irresponsible power of the father, it is held that a contract of marriage entered into by a father or any person standing in *loco patris*, must not be prejudicial to the interests of the minor. If the father were to contract his child to an eunuch, to a slave, or a leper, or to one suffering from elephantiasis, or any other malady of such a nature as would prevent connubial relationship, the marriage would be invalid, and would be set aside at the motion of any friend of the infant or by the guardian next in degree to the father of the child—the mother.‡ If the father were to marry the child to one very much beneath him or her in rank or quality, such marriage also is liable to be set aside on the application of the minor's next friend.§

Al-Kafât or Equality in marriage.

The Arabian legislator appears to have viewed with much disapprobation ill-assorted marriages. He is

* The Mâlikîs are the dissidents.

† "Fatâwa-i-Alamgîrî," p. 412; "Fusûl-i-Imâdiyah;" "Sharâya," pp. 263, 264; "Jâma-ush-Shattât."

‡ De Ménerville, "Jurisprudence de la Cour d'Alger."

§ 1 "Hed." pp. 110-113 (Eng. Trans.).



said to have declared that women should not be contracted in marriage except to their equals.*

The Hanafis accordingly hold that *equality* between the two parties is a necessary condition in marriage, and that an ill-assorted union is liable to be set aside by a decree of the judge.

The Hanafi doctrines regarding equality are founded chiefly on Arab analogies. For example, it is declared that the husband should be the equal of the wife in lineage and rank, should not be a slave, should be a Moslem, should be possessed of sufficient means "to pay the wife's dower and provide for her maintenance," should be virtuous and pious,† should be the wife's equal in trade or business.‡ A woman is not required to fulfil any of these conditions; equality is

* "Take ye care," said he, "that none contract woman in marriage but their proper guardians, and that they be not so contracted except with their equals," "because," adds the "*Hedâya*," "cohabitation, society, and friendship cannot be completely enjoyed excepting by persons who are each other's equal (according to the customary estimation of equality), as a woman of high rank and family would abhor society and cohabitation with a mean man; it is requisite therefore that regard be had to equality with respect to the husband, that is, the husband should be the equal of the wife."—1 "*Hed.*" p. 110.

† "A profligate is not the equal of a good woman. . . . A person marries his young daughter to a man under the impression that he is virtuous. It afterwards appears that he is a habitual drunkard, and the girl on attaining puberty declares she is not content with the marriage. Under these circumstances, if the father was not aware of his being a drunkard, the marriage is liable to be cancelled."—1 "*Fatâwa-i-Alamgîrî*," p. 411.

‡ 1 "*Fatâwa-i-Kâzi Khân*," p. 399.



not necessary in a wife, for a husband can raise her to his own rank, however high.

The Mâlikîs and the Shiahs differ materially from the Hanafîs in their estimate of the character of these conditions. According to them, Islâm and an ability to support a wife are the two necessary conditions to constitute a well-assorted marriage.* A Moslem possessed of sufficient means to maintain a wife may, among the Mâlikîs and the Shiahs, marry any Moslem woman, without question of lineage or rank; "for are not," it is pertinently asked, "all Moslems equals."†

But if a woman be contracted in marriage by her guardian to a person who is not socially *her equal*, she has the right to cancel the contract, though if she herself have entered into it, it is binding on her.‡

The question of ability to support a wife has been a fruitful source of discussion among the early lawyers.

* 1 "Fatawa-i-Kâzi Khân," p. 399; "Sharâya," p. 278; "Jâma-ush-Shattât."

† According to the Hanafî doctrines, an Arab of any tribe but the Koreish is not the equal of a Koreishite woman; a non-Arab is not the equal of an Arabian woman; a slave is not the equal of a free woman. So that all unions between such people are *theoretically* ill-assorted marriages. The marked distinction between the Shiah and Hanafî doctrines on this point, is shown by the "Sharâya." "It is lawful" says the "Sharâya," "for a free woman to marry a slave, for an Arabian woman to marry a Persian, or for a woman of the tribe of Hâshim to marry a non-Hashimite and *vice versa*," p. 278. So also the "Mafâtih."

‡ *Ibid.* "It is abominable for a woman to marry a profligate and the abomination is aggravated by his being an habitual drunkard."



The *consensus* of opinion seems to be that if the husband possesses means to maintain his wife for one month, besides paying the dower, it is a sufficient "ability" in law.*

It is needless to add here that cases bearing on the points of equality required under the Hanafî law rarely arise in India.†

It has been already mentioned that the Shiah and the Hanafîs allow the greatest freedom to women, who are *sui juris*, to contract themselves in marriage. But such freedom is restrained by the power of veto or objection possessed by the guardians in case of a misalliance.‡ Among the Shiah, this right of veto is almost *nil*, owing to the fact that the conditions of equality according to their doctrines have reference only to the Islâm of the husband and his ability to support the wife. If an adult woman of the Shiah school allies herself to a non-Moslem, it is probable that her relations have the same right of objection as relations undoubtedly have under the Sunni law.

Among the Hanafîs, this right of objection has far greater importance. In the case of the rule laid down for the guidance of the guardians, when entering into a contract of marriage for their wards, the principle

* 1 "Fatawa-i-Alamgîrî," p. 411.

† "Except Islâm and freedom," says the "Fatawa," "equality in any other respect is not invariably observed in a country other than Arabia."

‡ 1 "Fatawa-i-Kâzi Khân," pp. 401, 468; and 1 "Fatawa-i-Alamgîrî," p. 412



and the limits are easily definable. Guardians are directed to have regard to the ages of the parties; not to marry a young girl to a very old man and *vice versa*; not to allow a marriage to take place between a female belonging to a noble family, and one far beneath her in rank or status* should he not possess some qualification to justify the alliance, and not to marry minor girls on grossly inadequate dowers, &c.

In the case of a misalliance contracted by an adult woman, the question of *inequality* is fraught with great difficulty. An analysis of the various decisions collected together in the several digests, notably the "Fatâwa-i-Alamgîrî," and the "Fatâwa-i-Kâzi Khân," leads to the conclusion that in Musulman communities outside the Peninsula of Arabia, great disparity in rank, refinement, culture, social position or means, would furnish reasonable and proper grounds for a guardian or *walî* to object to a marriage contracted by a female who is *sui juris*. For instance, if a woman were to contract a run-away marriage with a servant of her family, the marriage would be annulled by the Kâzi on the application of the *walî*. Difference of faith would always justify an objection to a marriage.

An *ill-assorted* marriage or a misalliance contracted by a woman remains intact with all its consequences

* It must be added, however, that a man who is "rich in learning" is regarded "the equal" of the noblest born woman.



until annulled by the order of the Kâzi.* A judge alone has the power of cancelling marriages on the ground of inequality. The judicial separation affected by the Kâzi is not equivalent, however, to a *talâk*, so that if the marriage has not been consummated the woman is not entitled to any part of the dower. But if consummation has taken place or there has been a "valid retirement" into the nuptial chamber, then he is liable for the whole dower and for maintenance during the *Iddat*.†

The delay of a guardian in instituting proceedings to set aside a marriage on the ground of misalliance does not lead to the forfeiture of his right.‡ "But after the woman has actually borne a child to her husband the guardians have no right to have the marriage cancelled." §

When the guardian has once, by word or deed, expressly or impliedly, acquiesced in the marriage, he loses absolutely his right of objection; or, when one guardian has consented, none other except one higher in degree, can object.||

* 1 "Fatawa-i-Kâzi Khân," pp. 401, 468.

هذا التفريق لا يتم الا بقبض القاضي وقبل القضاء النكاح قائم
بجميع احكامه من الطلاق والتوارث *

† 1 "Fatawa-i-Alamgîrî," p. 412; 1 "Fatawa-i-Kâzi Khân," p. 401; "Fusûl-i-Imâdiyyah;" "Kanz-ud-Dakâik."

‡ "Fatawa-i-Kâzi Khân," p. 401.

§ 1 "Fatawa-i-Alamgîrî," p. 412.

|| The "Fatawa-i-Alamgîrî" (vol. i. p. 412), says that if the *walî* take possession of the dower and provide the *jahâz* (in common parlance, *jahêz*) it amounts to acquiescence.



The power of objecting belongs exclusively to the *Asabâh* of the woman and not to the uterine relations.*

It is difficult to say whether the civil courts in British India would entertain a judicial proceeding or suit by a Hanafi father to set aside, on the ground of inequality, a marriage contracted by an adult daughter.

If either of the married parties should die before the decree of the judge is issued cancelling the marriage, the survivor would be entitled to a share in the inheritance of the deceased, as in any ordinary case.

Option of Puberty (Khyâr-ul-bulûgh).

The validity of marriages contracted for minors by any guardian other than the father or the grandfather, is not established until ratified by the parties on arriving at puberty, such ratification in the case of males must be express, and in the case of females may be either *express or implied*.† On arriving at puberty both the parties have the right of either ratifying the contract entered into during their minority or of cancelling it.

According to the Sunnis, in order to effect a disso-

* "Fusûl-Imâdiyyah;" "Fatâwa-i-Kâzi Khân," pp. 402, 468.

† 1 "Fatâwa-i-Alamgîrî," p. 403. "The right of option in a virgin," says the "Hedâya," "is done away with by her tacit consent, but the right of option in a man is not done away with until he expresses consent by word or deed."—Eng. Trans., pp. 104, 105.



lution of the matrimonial tie, in exercise of the right of option reserved to the parties, it is necessary that there should be a decree of the judge, and until such decree is made, the marriage remains intact. If before a decree has been obtained one of the parties should die, the survivor would be entitled to inherit from the deceased.*

The Shiahs differ materially from the Sunnis on this point. They hold that a marriage contracted on behalf of minors by any unauthorised person (*fazûlî*), i.e. any person other than a father or a grandfather, remains in absolute suspension or abeyance until assented to by the parties on arriving at puberty; that, in fact, no legal effect arises from it until such ratification, and if in the interval previous to ratification one of the parties should die, the contract would fall to the ground and there would be no right of inheritance in the survivor.†

It may be added that under the Shiah law every person, other than a father or grandfather, contracting a marriage for an infant is a *fazûlî*. Even a mother contracting a minor child is regarded as a *fazûlî*. A contract of marriage entered into by *fazûlîs* is validated by the assent of the father or grandfather, if present and competent, or by the subsequent ratification of the minor or minors.‡

* 1 "Fatawa-i-Alamgiri," p. 402.

† "Mafâtih;" "Jâma-ush-Shattât."

‡ "Jâma-ush-Shattât."



Causes for which Marriage may be Cancelled.

When one of the parties to the marriage contract is suffering from some disease, which prevents the consummation of the marriage, and this fact was not known to the other contracting party, the latter has the right of asking for a cancellation of the marriage.

There is great divergence between the Sunni and the Shiah doctrines regarding the power of cancellation given to the parties for the causes referred to, as well as regarding the procedure to be adopted for enforcing the cancellation. The question of procedure will be treated of in a future chapter ; here attention will be simply directed to the causes for which a marriage may be cancelled among both Sunnis and Shiahs.

Both schools allow a wife to claim a separation on the ground of confirmed and incurable impotency, if she married him in ignorance of this circumstance.* The principle applies equally to those whose impotence arises from permanent infirmity and those whose incapacity is the result of mutilation, self-inflicted or otherwise. But in the first case, if the debility be only temporary and capable of being cured, it is not a sufficient cause for cancellation of the marriage.†

* It is the same under the Hebraic law. Pothier uses almost similar words in describing the right of the wife to claim a divorce for impotence. "Il n'y a qu'une impuissance perpetuelle et incurable, telle que celle qui résulte de la privation de quelqu'une des parties nécessaire à la generation qui forme un empêchement de mariage ;" Pothier, "Cont. de Mariage." Same under the Canonical law.

† Comp. Pothier, "celle qui n'est que passagère, et dont on peut espérer la guérison ne rend pas la personne en qui elle se raconte



According to the Sunnis, the wife is entitled to separation if the husband is unable to consummate the marriage with her, notwithstanding that the inability is *special* in her case.* According to the Shiah, if the inability is only *special*, the wife has no option.† Both schools deny the right of cancellation if incapacity supervened after consummation of the marriage, and also if the woman had entered into the contract with knowledge of the fact that the man was impotent.‡

The right of option to annul a marriage is allowed to both parties on the ground of physical malformation, which interferes with connubial relationship, leprosy, insanity, and elephantiasis. The "Hedâya" at one place, however, says that if the husband be "a lunatic, leprous, or scrofulous," the wife has no option. But this opinion has not been adopted by the compilers of the "Fatâwa-i-Alamgîrî," or any of the later jurists. It is expressly stated in the "Fatâwa" § that if the insanity be incurable, the wife has the right to claim a cancellation of the marriage, the procedure being the same as in the case of physical impotency. *Mutatis mutandis*, the continued insanity of the wife vests in the husband the right to claim a cancellation

incapable de mariage." Incurable impotency existing at the time of marriage under the English law entitles a wife to a divorce.

* 1 "Fatâwa-i-Alamgîrî," p. 707.

† "Sharâya," p. 278.

‡ 1 "Fatâwa-i-Alamgîrî," p. 709; "Fusûl-i-Imadiyah;" 1 "Fatâwa-i-Kâzi Khân," p. 298; "Sharâya," p. 298; "Jamâ-ush-Shattât."

§ 1 "Fatâwa-i-Alamgîrî," p. 710.



of the marriage. In all similar cases referring to women, the disease must have existed previous to marriage, in order to entitle the husband to claim a cancellation. If the disease supervened after marriage the husband has no power to have the marriage cancelled.*

Under the Shiah law, the right of option possessed by a wife is more extended than that possessed by the husband. The wife, under the Shiah law, is entitled to ask for a cancellation of the marriage on the ground of her husband's mental derangement, whether it is permanent or occasional, whether it existed before marriage or supervened after marriage.† In the case of the insanity of the wife, the derangement must be confirmed and must have existed from before marriage in order to entitle the husband to have the marriage cancelled. Occasional aberrations or stupors, though of frequent occurrence, do not give to the husband that right.‡

In all the cases referred to, the married parties have only a right of option. The husband or the wife may, on becoming aware of the nature of the disease with which the one or the other is afflicted, agree either to abide by the contract or to ask for a cancellation. In the latter contingency the right must be exercised with as little delay as possible. Any

* "Fatâwa-i-Alamgîrî," p. 754.

† "Sharâya-ul-Islâm," p. 287.

‡ "Jâma-ush-Shattât."



unreasonable delay in availing themselves of the right of option would give rise to the presumption of acquiescence and waiver.

If one of the parties to a contract has been induced by the other to enter into it on fraudulent misrepresentations, he or she has the right to ask for a cancellation, or, under the Shiah law, to dissolve it without any formality, of his or her own motion, on becoming aware of the fraud (*tadlīs*).

If a man were to represent himself as legitimate and it was proved afterwards that he was illegitimate, or if the husband were to assume a false lineage, and represent himself as his wife's equal in birth when in fact he is much her inferior, the woman has a right to cancel the marriage.*

Under the Sunni law, if a woman fraudulently assume a higher rank or lineage than her own and thus induce the husband to enter into a contract of marriage, he would, on becoming aware of the deception, have no right of option.† Under the Shiah law, he would be equally entitled with the woman to exercise the right.‡

“When a man has married a woman on condition of her being free and she proves to be a slave, or when a woman has married a man on condition of his being free, and he proves to be a slave,” both, viz. in one

* 1 “Fatawa-i-Alamgiri,” p. 411; “Sharāya,” p. 289.

† 1 “Fatawa-i-Alamgiri,” p. 411.

‡ “Sharāya,” p. 290.



case the husband, in the other the wife, have the right of cancellation.*

Under the Sunni law, if the woman herself entered into the contract, she has no right of option, though her *wali* would have the right to object on the ground of inequality.

Under the Shiah law, when a man marries a woman *stipulating* her to be a virgin, and finds her not one, he has no power to cancel the marriage. Under the Sunni law there is a divergence of opinion, some of the jurists agreeing with the Shiah doctors, others holding that if the husband has been fraudulently deceived, he would have a right of option.

Under the Shiah law, when a father agrees to give his legitimate daughter in marriage to a man and then substitutes the daughter of his concubine, the husband has a right of option. Or, when a father has deceived the husband with reference to the identity of the daughter to whom he has been married, the husband has the right to cancel the contract and ask for a return of the presents made by him.†

In all these cases, when marriage is cancelled by the exercise of the right of option vested in one or the other party, the separation has not the same effect as a divorce. Accordingly, where there has been no consummation, actual or constructive, the wife has no right to dower.

* "Sharāya," p. 290; "Jāma-ush-Shattāt;" "Maḥāth."

† There are numerous examples of *taḍlīs* given in the "Jāma-ush-Shattāt," and discussed in detail.



Effect of Apostasy from Islâm on the Status of Marriage.

Under the Mahommedan law, if a Moslem husband or a Moslem wife apostatise from Islâm, the apostasy has the effect of dissolving the marriage-tie between the parties. The Native Converts' Marriage Act has made a variation in this rule of the Mahommedan law. Under the provisions of this Act, if the husband apostatise, he can still demand that his wife should maintain conjugal relations with him, and in case of her refusal he can sue for a divorce from her.

If the wife should elect to live with him after his apostasy from Islâm, the rule of the Mussulman law would have no effect, and the marriage would under the Act remain valid, though its legal effects will be regulated by principles other than those of the Islâmic law. Should the wife, however, refuse to cohabit with the apostate husband, the Mahommedan law, as well as the provisions of the Act, would set aside the marriage.

Conversion to the Islâmic faith does not necessarily lead to a dissolution of the marriage tie under the Mahommedan law. If a Hebrew or a Christian husband adopt Islâm and the wife continue to follow the religion of her race, the marriage remains lawful and binding. But if an idolatrous husband, married to an idolatrous wife, become a Mussulman, the marriage between them is dissolved, unless she also adopts Islâm. Similarly, when a Hebrew or a Christian



female, married to a husband of her own faith, adopts the Moslem faith, the marriage is dissolved unless the husband follows her example.

NOTE I.

Illicit intercourse with a woman forbids to the man, under the Hanafi and the Shiah law, the persons of her mother and daughter. Not so among the Shâfeïs and Mâlikîs.

Among the Hanafis a man may marry four female slaves. Among the Shâfeïs and Mâlikîs, he can marry only one female slave. Among the Hanafis a slave can have only two wives. Among the Mâlikîs, Shâfeïs, and the Shiahs, he may have four wives. Among the Hanafis it is unlawful to marry a female slave after marrying a free woman. Among the Shâfeïs and Mâlikîs it may be done if the wife consent.

NOTE II.

In the case of *Badarunnissa Bibi v. Mafiatulla* (7 Beng. L. R. A. C., p. 442), it was held that, where a husband, at the time of marriage, entered into a private agreement with his wife, authorising her to divorce him upon his contracting a second union during her life, and without her consent, the wife was entitled to a divorce, on proof of the husband having married a second time without her consent,—such an agreement being valid under the Mahommedan law.



CHAPTER IX.

RIGHTS AND DUTIES OF THE MARRIED PARTIES.—ANCIENT
CUSTOMS. — MAINTENANCE. — ABSENT HUSBAND. —
CONJUGAL DOMICIL.

THE Mahommedan law lays down in express and emphatic terms the rights and duties which spring from marriage. Prior to the Islâmic legislation, and especially among the pagan Arabs, women had no *locus standi* in the eye of the law. The pre-Islâmic Arab customs as well as the Rabbinical law dealt most harshly with them.*

The Koran created a thorough revolution in the condition of women. For the first time in the history of oriental legislation, the principle of equality between the sexes was recognised and practically carried into effect. "The women," says the Koran, "ought to behave towards their husbands in like manner as their husbands should behave towards them, according to

† 3 Caussin de Perceval, "Hist. des Arabes," p. 337.



what is just.”* And Mohammed in his discourse on *Jabl-i-Arafât* emphasised the precept by declaring in eloquent terms, “Ye men, ye have rights over your wives, and your wives have rights over you.”† In accordance with these precepts the Mahommedan law declares *equality* between the married parties to be the regulating principle of all domestic relationship. Fidelity to the marriage bed is inculcated on both sides; and unfaithfulness leads to the same consequences, whether the delinquent be the husband or the wife. Chastity is required equally from man and woman.‡

The husband is legally bound to maintain his wife and her domestic servants, whether she and her servants belong to the Moslem faith or not.§ This obligation of the husband comes into operation when the contract itself comes into operation, and the wife is subjected thereby to the marital control.|| It continues in force during the conjugal union, and in certain cases even after it is dissolved.

* Koran, chap. ii., v. 228.

† Ibn Hishâm.

‡ “Unchastity of the eye is more culpable,” says the Mussulman moral law, “than the unchastity in fact.” This rule is not one-sided.

§ “It is incumbent on the husband to maintain his wife,” says the “*Fatâwa-i-Kâzi Khân*,” “whether she be Moslemah or (*zimmiyah*) non-Moslemah, poor or rich . . . young or old. . . .” Vol. i. p. 479.

|| So I render the word *Intebâs* (احتباس), see “*Fatâwa-i-Kâzi Khân*,” p. 479.



The maintenance (*nafkah*) of a wife includes everything connected with her support and comfort, such as food, raiment, lodging, &c., and must be provided in accordance with the social position occupied.*

The wife is not entitled merely to maintenance in the English sense of the word, but has a right to claim a habitation for her own exclusive use, to be provided consistently with the husband's means.

If the wife, however, is a minor so that the marriage cannot be consummated, according to the Hanafî and the Shiah doctrines, there is no legal obligation on the husband's part to maintain her.†

With the Shâfeîs it makes no difference, in the obligation of the husband to maintain his wife, whether the wife be a minor or not.‡

Nor is a husband, under the Hanaffi and the Shiah law, entitled to the custody of the person of a minor wife whom he is not *bound* to maintain.§

If the husband be a minor and the wife an adult,

* 1 "Fatawa-i-Alamgîrî," p. 737; 1 "Fatawa-i-Kâzi Khân," "Jâma-ush-Shattât;" "Fusûl-Imâdiyah;" "Mafâtih;" 1 "Hed." (Eng. Trans.), p. 392.

"It is incumbent on the husband to provide a separate apartment for his wife's habitation, to be solely and exclusively appropriated by her, because this is essentially necessary to her, and is therefore her due, same as her maintenance, and the word of God appoints her a dwelling-house as well as a subsistence."—1 "Hed." (Eng. Trans.), p. 401.

† 1 "Fatawa-i-Alamgîrî," p. 773; "Kanz-ud-Dakâik;" 1 "Hed." (Eng. Trans.), p. 394; "Jâma-ush-Shattât."

‡ "Kitâb-ul-Anwâr;" 1 "Hed." (Eng. Trans.), p. 394.

§ In *re Khattija Bibi*, 5 "Bengal Law Reports," O. C. J. 557.



and the incapacity to complete or consummate the contract be solely on his part, she is entitled to maintenance.*

It makes no difference in the husband's liability to maintain the wife whether he be in health or suffering from illness, whether he be a prisoner of war or undergoing punishment, "justly or unjustly," for some crime, whether he be absent from home on pleasure or business, or gone on a pilgrimage.† In fact, as long as the status of marriage subsists, and as long as the wife is subject to the marital power, so long she is entitled to maintenance from him. Nor does she lose her right by being afflicted with any disease.‡

When the husband has left the place of the conjugal domicile without making any arrangement for his wife's support, the Kazi is authorised by law to make an order that her maintenance shall be paid out of any fund or property, which the husband may have left in deposit or in trust, or invested in any trade or business.§

A wife may contract debts for her support during the husband's absence, and if such debts are legitimate, contracted *bonâ fide* for her support, the creditors have a "right of recovery" against the husband.||

* 1 "Hed." (Eng. Trans.), p. 395; "Fusûl-i-Imâdiyah ;"

1 "Fatâwa-i-Kâzi Khân," p. 480; "Jâma-ush-Shattât."

† 1 "Fatâwa-i-Alamgîrî," p. 733.

‡ 1 "Fatâwa-i-Alamgîrî," p. 734; "Jâma-ush-Shattât."

§ 1 "Fatâwa-i-Alamgîrî," p. 750.

|| "Nail-ul-Marâm.

In the same way, if the husband be unable for the time being to maintain his wife, "it would not form a cause for separation," says the "Hedayah," "but the magistrate may direct the woman to pledge her husband's credit and procure necessities for herself, the husband remaining liable for the debts."*

When the husband is absent and has left real property either in the possession of his wife or of some other person on her behalf, the wife is not entitled to sell it for her support, though she may raise a temporary loan on it, which the husband will be bound to discharge, provided the mortgage was created *bonâ fide* for her or her children's support, and did not go beyond the actual necessity of the case. Under such circumstances the mortgagee is bound to satisfy himself that the money advanced is applied legitimately to the support of the family of the absent husband.†

When the woman abandons the conjugal domicile without any valid reason, she is not entitled to maintenance.‡ Simple refractoriness, as has been popularly supposed, does not lead to a forfeiture of her right. ¶ If she live in the house, but do not obey the husband's wishes, she would not lose her right to her proper maintenance. If she leave the house against his will without any valid reason, she would lose her

* 1 "Hed." (Eng. Trans.), p. 297.

† 1 "Fatâwa-i-Alamgîrî," p. 737.

‡ 1 "Fatâwa-i-Alamgîrî," p. 733; "Fusûl-i-Imâdiyyah," "Jâma-ush-Shattât."



right, but would recover it on her return to the conjugal domicile.*

What is a valid and sufficient reason for the abandonment of the conjugal domicile is a matter for the discretion of the Kazi or judge. As a general principle and one which has been adopted and enforced by the Kazis' *mahkamas* in Algeria, 'a wife who leaves her husband's house on account of his or his relations' continued ill-treatment of her, does not come within the category of *nāshizah* and continues entitled to her maintenance.

A woman who is imprisoned for some offence, or is undergoing incarceration in the civil jail for non-payment of a debt,† or who goes on a voyage or pilgrimage without her husband's consent, has no right to claim any maintenance during her absence.‡

Among the Shiahs if she goes on an *obligatory* pilgrimage,§ even without her husband's consent, she is nevertheless entitled to maintenance.

The husband's liability to support the wife continues during the whole period of probation,|| if the separation has been caused by any conduct of his, or has taken place in exercise of a right possessed by her. The husband would not, however, be liable to sup-

* "Fatawa-i-Alamgirî," "Jâma-ush-Shattât," "Kitâb-min lâ-Euhazzar al Fakîh."

† Should she be put in jail by the husband, she would not lose her right of maintenance.

‡ 1 "Fatawa-i-Alamgirî," p. 734.

§ *Hajj-ul-Farr*.

|| See *ante*, p. 257.



port the wife during the *iddat*, if the separation is caused by her misconduct.*

If she is pregnant at the time of separation her right remains intact until she is confined of the child.

The "Hedâya" seems to imply that a woman is not entitled to maintenance during the period of probation she observes on the death of her husband.† As the Koran, however, distinctly says, "Such of you as shall die and leave wives ought to bequeath to them a year's maintenance," several jurists have held that a widow has a right to be maintained from the estate of her husband for a year, independently of any share she may obtain in the property left by him. This right would appertain to her whether she be a Moslemah or non-Moslemah.

In the case of probation (*iddat*) observed by a woman on the death of her husband, the Sunnis calculate the period from the actual date of his decease; the Shiahhs from the day on which the wife receives the news of the death.

According to the Sunnis the liability of the husband to maintain a pregnant wife from whom he has separated ceases at her confinement.‡ The Shiahhs, on the other hand, hold that the liability lasts for

* 1 "Fatawa-i-Alamgîrî," p. 746; "Jâma-ush-Shattât;" 1 "Fatawa-i-Kâzi Khân," p. 481.

† 1 "Hed." p. 407.

‡ 1 "Hed." p. 360.



the same period after confinement as if the woman was not *enciante*.*

If the husband be insane the wife is entitled, according to the Shâfeî doctrines and the views of the compilers of the "Fatawa-i-Alamgîrî," to maintenance for the period of one year, which is fixed by the Kazi in order to discover whether the insanity is curable or not. The Mâlikîs, with whom the author of the "Hedâya" seems to agree, deny to the wife the right of asking for a dissolution of the marriage tie on the ground of the husband's insanity. Among them the wife, therefore, retains the right of maintenance during the insanity of her husband, however long continued. With the Shiahhs the wife is entitled to a cancellation of the marriage contract if the husband's insanity be incurable. Should she exercise this right and dissolve her marriage, her right to maintenance ceases.

Conjugal Domicil.

The Mahommedan law lays down distinctly (1) that a wife is bound to live with her husband, and to follow him wherever he desires to go; † (2) and that on her refusing to do so without sufficient or valid reason the courts of justice, on a suit for restitution

* "Jâma-ush-Shattât."

† Some jurists are inclined to hold that a wife may refuse to follow her husband into a country which is at war with the country of her domicil. This is the only meaning which can be attached to the dictum that she may refuse to go with him to the *Dâr-ul-Harb*.



of conjugal rights by the husband, would order her to live with her husband.

The wife cannot refuse to live with her husband on pretexts like the following:—

- (1.) That she wishes to live with her parents.
- (2.) That the domicil chosen by the husband is distant from the home of her father.
- (3.) That she does not wish to remain away from the place of her birth.
- (4.) That the climate of the place where the husband has established his domicil is likely to be injurious to her health.
- (5.) That she detests her husband.
- (6.) That the husband ill-treats her frequently (unless such ill-treatment is actually proved, which would justify the Kazi to grant a separation).*

The obligation of the woman, however, to live with her husband is not absolute. The law recognises circumstances which justify her refusal to live with him. For instance, if he has habitually ill-treated her, if he has deserted her for a long time, or if he has directed her to leave his house or even connived at her doing so, he cannot require her to re-enter the conjugal domicil or ask the assistance of a court of

* Most of these examples are taken from the cases decided by the Algerian Kâzis and reported by Sautayra and De Ménerville. But those who have any experience of Indian life will see at once that exactly similar pretexts are urged by the Indian Mussulman women among the lower classes when they refuse to live with their husbands.



justice to compel her to live with him. The bad conduct or gross neglect of the husband is, under the Mussulman law, a good defence to a suit brought by him for restitution of conjugal rights.

In the absence of any conduct on the husband's part justifying an apprehension that if the wife accompanied him to the place chosen by him for his residence, she would be at his mercy and exposed to his violence, she is bound by law to accompany him wherever he goes. At the same time the law recognises the validity of express stipulations, entered into at the time of marriage, respecting the conjugal domicile. If it be agreed that the husband shall allow his wife to live always with her parents, he cannot afterwards force her to leave her father's house for his own. Such stipulation in order to be practically carried into effect *must* be entered in the deed of marriage; a mere verbal understanding is not sufficient in the eye of the law.

If the wife, however, once consent to leave the place of residence agreed upon at the time of marriage, she would be presumed to have waived the right acquired under express stipulation, and to have adopted the domicile chosen by the husband. If a special place be indicated in the deed of marriage as the place where the husband should allow the wife to live, and it appear subsequently that it is not suited for the abode of a respectable woman, or that injury is likely to happen to the wife if she remain there, or that the wife's parents were not of good character,



the husband may compel the wife to remove from such place or from the house of such parents.

The husband may also insist upon his wife accompanying him from one place to another, if the change is occasioned by the requirements of his duty.

Every case in which the question of conjugal domicile is involved will depend, says De Ménerville, upon its own special features, the general principle of the Mussulman law on the subject being the same as in other systems of law, viz. that the wife is bound to reside with her husband, unless there is any valid reason to justify her refusal to do so. The sufficiency or validity of the reasons is a matter for the consideration of the Kazi or judge, with special regard to the position in life of the parties and the usages and customs of the particular country in which they reside.

Maintenance of Children.

Among the pre-Islâmite Arabs no obligation existed on the part of either of the parents to maintain their children, nor was any relation bound to maintain any other; on the contrary we learn from history that during that dark period of rapine, slaughter, and misery which immediately preceded the promulgation of the Islâmic laws in the Arabian peninsula, the birth of children imposed no obligations on the father. Female children especially were regarded as a misfortune, and were frequently buried alive to prevent their proving a burden to the tribe of their parents.



Mohammed strongly condemned this inhuman and unnatural practice, and declared the maintenance of children to be obligatory on the father; at the same time he directed that where the parents were infirm and old and unable to support themselves, the children should provide for their support. He required the children to treat their fathers and mothers with respect and consideration; nor did he ever cease to repeat the words, which, according to MM. Perron and Sautayra, mark the great distinction between his legislation and all the ancient systems, that "a respectful and obedient child shall attain to heaven in the footsteps of its mother."

In consequence of these precepts, the Mussulman civil law imposes on parents the duty of maintaining their children, and of educating them properly. This obligation rests naturally upon the father; and the "Hedâya" declares, in terms which can hardly be misconstrued, that "the maintenance of minor children rests on their father, and no person can be his associate or partner in furnishing it" (that is, share the responsibility with him).*

In all cases concerning the maintenance of infant children, consideration is chiefly to be paid to the interest of the children. So long as the father is able to maintain them it is incumbent on him to do so, and debts incurred on their behalf by any person are recoverable from him.

* 1 "Hed." p. 408.



A man who is able by his labour to procure sustenance for his family is bound to support them, although he may be in straitened circumstances. In case the father wilfully neglects and deserts his children, legitimate or illegitimate, and refuses to maintain them when he has the means, he is liable to punishment at the discretion of the Kâzi.*

Difference of faith or creed between father and child makes no difference in the obligation of the father to maintain the child.†

Among the Hanafîs, when the father is poor and the mother rich, the liability to maintain the infant children falls on her, with an eventual right of recovery against her husband, even though the children may have a rich paternal grandfather.‡

Among the Shiahhs, if the father be poor the liability rests primarily on the grandfather, if he have means, and not on the mother, even though she be rich.§

When the father and mother are both poor, the grandfather possessed of means, is liable to maintain his infant grandchildren, with a right to recover all money spent on them from the father. But if the latter be infirm, the grandfather would have no right of recovery against him for any debt incurred for the maintenance of the grandchildren.¶

* See the provisions of the Indian Acts, X. of 1872 and IV. of 1877.

† 1 "Fatâwa-i-Alamgîrî," p. 750.

‡ *Ibid.*, p. 752.

§ "Jâma-ush-Shattât."

¶ 1 "Fatâwa-i-Alamgîrî," p. 753.



The obligation of maintaining the male children lasts until they arrive at puberty. After this, a father is not bound to maintain his male children, unless they are incapacitated from work through some disease or physical infirmity, or are engaged in study. When male children are strong enough to earn their own livelihood, though not actually adult, the father may set them to work for their own subsistence, or hire them out for wages.*

If the male children are actually able to work, but the employment found for them is unsuitable or improper for their rank in life, they should be placed on the same footing as children labouring under some infirmity. Ability to work must in such cases be considered with reference to the social position of the children, as well as the parents; so that a father occupying a respectable position, in which the children have been brought up delicately, must not hire them out for work which is degrading in its nature or associations.

When an adult son is lame, or paralytic, or is in any way a cripple, the obligation of maintaining him rests on the father; so also if he is insane.

A father is bound to maintain his female children until they are married, if they have no independent means of their own. He cannot hire them out for work or send them into service under any circumstance.

* 1 "Fatawa-i-Alamgiri," p. 753; 1 "Fatawa-i-Kâzi Khân," p. 482.



Marriage does not necessarily absolve the father from the obligation of maintaining his daughter.

Should he contract a daughter in marriage to a man, concealing the fact that she was suffering from a disease which will give the husband legal grounds for dissolving the marriage, he would be liable for the maintenance in case of the dissolution of the marriage.

Children possessed of private property are to be maintained out of it from the time they are weaned. Until then the father is bound to support and provide suitable attendance for them.*

When a father maintains his children out of their earnings, it is his duty to be careful of the surplus and to make it over to them when they arrive at majority. If the father cannot discharge this duty, or if he be false to the trust reposed in him, the Kazî should appoint some trustworthy person to take care of the earnings of such children until they are of age to receive them.

A father is bound to maintain his son's wife when such son is young, or poor, infirm, or engaged in study.†

When a man is absent, but has left available property, the judge may order maintenance out of the same for the following persons, *provided they are poor*, viz. (a) the wife; (b) the male children if young,

* 1 "Hed." p. 410; 1 "Fatâwa-i-Alamgîrî," p. 752; "Fusûl-i-Imâdiyah;" "Jâma-ush-Shattât;" "Jâma-i-Abbâsi."

† 1 "Fatâwa-i-Alamgîrî," p. 753.



or if adult, unable to earn their own livelihood; (c) the female children, whether young or adult (if unmarried); (d) and the parents.*

A woman may compound with her husband for the maintenance of her minor children, but if such composition prove prejudicial to their interests it is not binding on the mother. In the same way, if a woman on separating from her husband agree to take charge of the children of the union and support them without requiring any assistance, and if she discover subsequently that she is unable to do so from poverty, the law will compel the husband to support his children, in spite of the stipulation entered into at the time of separation.

A husband is not liable for the support of the children of his wife by a former husband, unless he has expressly agreed to do so at the time of the marriage.

When children have means, they are bound to maintain their parents if in straitened circumstances, and it makes no difference in their liability whether the parents are Moslems or non-Moslems.† Should the parents be able to eke out a livelihood by manual labour, the children would not be absolved from the obligation of helping to maintain them.

* 1 "Fatâwa-i-Alamgirî," p. 754; "Badâyah."

† "It is incumbent," says the "Hedâya" (vol. i. p. 411), "upon a man to provide maintenance for his father, mother, grandfather, and grandmother, if they should be in necessitous circumstances, although they be of a different religion . . . but their poverty is a condition of the obligation."



When the children are in straitened circumstances themselves, they are not bound to maintain their parents, unless these are absolutely infirm and unable to obtain a livelihood even by manual labour. In such cases the children are required to share their food with their weak and infirm father or mother, or with both.

Under the Hanafî law, a person is bound to maintain his grandparents, his infant male relations within the prohibited degrees, if they are in poverty; all female relations within the same degrees, whether infants or adults, when they are in necessity; and also all adult male relations within the same degrees, if they are blind or disabled, and at the same time poor. But with the exception of the grandparents, the support of these relations is only a quasi-legal obligation.*

In the case of wife, child, parents, and grandparents, difference of faith, according to the Hanafî doctrines, makes no difference in the obligation of maintenance, but it is otherwise in the case of other relations.* A rich Moslem is not bound to support his poor non-Moslem brother or uncle or cousin.

According to the Shiah, the Shâfeîs, and the Mâlikîs, the support of any relations besides the children, the parents, and the wife, is a mere moral obligation not enforceable by law.†

* Comp. "Fatawa-i-Alamgiri," vol. i. p. 756.

† Some of the Shiah jurists are in accord with the Hanafis in placing the grandparents in the same category as parents.



Daughters as well as *sons* are liable for the maintenance of their poverty-stricken parents.*

When a mother is poor and the son is able to work for his livelihood, he is bound to support her according to his means, though he be in straitened circumstances himself.

When a son is able to maintain one parent or grandparent only, the mother or the grandmother, as the case may be, has the preferential right. When a man has both parents and an infant child dependent on him, and has not ability to support all, his child has the first claim on him.

When there are several persons on whom the liability of maintaining a particular individual devolves, the Hanafis hold, that the liability should be apportioned according to the shares to which such persons would be entitled in the inheritance of the one whom they are required to support. For example, if a man who is poor have a son and a daughter, both possessed of sufficient competency, the son will have to contribute two-thirds of the maintenance, and the daughter one-third.†

From the principle adopted by the Algerian Kazîs and also from the cases given in the "*Jâma-ush-Shattât*," it would appear that among the Shiahs and the Mâlikîs, the more rational rule is followed of apportioning the liability according to the individual

* 1 "*Fatâwa-i-Alamgîrî*," p. 755; "*Fusûl-i-Imâdiyah*;" 1 "*Hed.*" p. 412; "*Bahr-i-Râik*;" "*Jâma-ush-Shattât*;" "*Mafâtih.*"

† 1 "*Hed.*" p. 414; 1 "*Fatâwa-i-Alamgîrî*," p. 752.

means of the parties. For example, if the daughter is rich and the son comparatively poor, the larger proportion of the maintenance devolves on her.

When a particular sum is agreed upon between the person who is liable and the person to whom maintenance is due, or when the Kazî has ordered a specific sum to be paid periodically, should a change occur in the circumstances of the parties, such change would justify a re-adjustment of the liability.* If the liability has been fixed by an order of the Kazi, it is in his discretion, upon a proof of a change in the circumstances of the parties, to modify his order to suit the new requirements of the case.

If the person against whom an order is made, fails to comply with it, satisfaction of the debt may be obtained either by an attachment and sale of his goods, or he may be imprisoned for contumacy.

A mere plea of poverty would not absolve an individual from the obligation of maintaining his wife or children. If the man be able to work for his livelihood, if he be not a cripple or so infirm that he cannot do anything to earn a sustenance, he is bound to provide for their maintenance.

* See the provisions of sec. 232 and the following sections of Act. IV. of 1877; and the cognate sections of Act. X. of 1872.



NOTE.

It may be remarked, by the way, that the Mussulman law on the subject of the conjugal domicile is very much in advance of the Jewish as well as the Roman law. Under the Jewish law, a woman who refused to follow her husband wherever he desired her to go, lost her right to her dower, the possessions which she herself brought from her parents' home, together with all rights which the law vested in her. Under the Roman law, a wife followed the domicile of her husband without the smallest right to question his choice; and this principle has been imported into the modern English law. The "Code Napoléon" provides (Art. 214) that "the woman is obliged to live with her husband and to follow him wherever he proposes to reside;" the consequence being that however objectionable a place may be, the wife has no option in the matter. As will be seen from the text, the Mahommedan law gives to the woman in many cases the right of questioning her husband's choice of the conjugal domicile.

Under the "Code Napoléon," as under the Mahommedan law, the woman who abandons the conjugal domicile temporarily, does not lose all the benefits of the contract of marriage (as is the case under the Jewish system) but simply her right to maintenance.



CHAPTER X.

ANTENUPTIAL SETTLEMENTS.—MAHR.—PROMPT AND
DEFERRED MAHR.*

IN order to constitute a valid marriage, the Mahomedan law requires that there should always be a consideration moving from the husband in favour of the wife, for her sole and exclusive use and benefit. This consideration is called *mahr* or *sadâk* in legal treatises, and in common parlance, *dâin mahr*.

The principle of antenuptial settlements is not peculiar to the Mahomedan law. Sautayra thinks that the custom originated in ancient times with the payments which the husbands often made to their wives as a means of support, and as a protection against the arbitrary exercise of the power of divorce.

* 1 "Fatawa-i-Kâzi Khân," p. 425; 1 "Fatawa-i-Alamgîrî," pp. 426-460; "Fusûl-i-Imâdiyah;" "Kanz-ud-Dakâik" (Pers. Trans.); 2 "Hed." (Eng. Trans.), p. 58; "Durr-ul-Mukhtâr;" "Kitâb-ul-Anwâr;" "Jâma-ush-Shattât;" "Sharâya-ul-Islâm;" "Mafâtih;" "Irshâd-i-Allâmah;" 1 Sautayra; D'Ohsson; Sicé.



The Jewish law insisted upon the specification of the dotal debt prior to the contract of marriage, and considered all marriages without a consideration as invalid; but among the Hebrews, the dower settled on the wife was never made over to her for her exclusive use and enjoyment; she acquired, in fact, no right over it until the marriage was dissolved, either by the death of the husband or by divorce, in which case the dower was made over to her, in order to enjoy or to dispose of, according to her own desire.*

The Islâmic legislation regarding the marriage consideration differs in two important features from the rules prevalent among the Hebrews. In the first place, it does not consider a marriage, contracted without specification of dower, as invalid; when no dower is specified, the law presumes a consideration in favour of the wife which is estimated on a recognised basis. In the second place the wife acquires an immediate right over the dower, or that portion of it which is "exigible" in its nature.

The *mahr* of the Islâmic system is similar in all its legal incidents to the *donatio propter nuptias* of the Romans. It is a settlement in favour of the wife, made prior to the completion of the marriage contract in consideration of marriage. * There is, however, this

* Among the Athenians and the Romans the woman brought the dowry. The Code Napoléon (Art. 1540) attaches the same character to the French *Dot*. In England, any property the woman brings with her is popularly called her *dowry*. It is in fact analogous to the *Jahâz* or *Jahâz* of the Mahommedans.



essential difference between the Roman *donatio propter nuptias* and the *mahr* of the Mussulmans, that whereas the former is purely voluntary on the part of the husband, the latter is absolutely obligatory. "*Mahr* or dower is so necessary," says the "Fatawa-i-Kâzi Khân," "to the marriage, that if it were not mentioned at the time of the marriage, or in the contract, the law will presume it by virtue of the contract itself."*

A stipulation on the part of the woman before marriage to abandon all her right to dower, is invalid and inoperative under the Mahomedan law, and should such a stipulation have been entered into, the wife would nevertheless be entitled to the customary dower. She can, if she choose after marriage, discharge the husband from his liability for the dower debt, or make over to him any property she may have received from him in satisfaction of his liability.

It has sometimes been supposed that the validity of the marriage depends on the *constitution* of the dower, and that when there is no consideration for the contract of marriage, nor a settlement effected in favour of the wife, the marriage is invalid. The "Hedâya" and the "Fatawa-i-Kâzi Khân," however, expressly declare that a marriage is valid, although there may not be any mention of dower at the time; "for," says the former authority, "the term *nikâh* (marriage) in its literal sense signifies a contract of union, which is effected by the union of the man and the woman, and

* 1 "Fatawa-i-Kâzi Khân," p. 426; 1 "Fatawa-i-Alamgîrî," p. 428; see also the "Jâma-ush-Shattât."



as the payment of *mahr* is enjoined by law, as a token of respect to the wife, its mention is not absolutely essential to the validity of the marriage. For just the same reason a marriage is valid, although the man were to engage in the contract on the especial condition that there should be no dower.”*

Similarly, the Shiah “Sharâya,” and the “Jâma-ush-Shattât,” declare that “the mention of dower is by no means a condition precedent to the validity of a contract of marriage, so that if a man were to marry a woman without any mention or specification of dower, or with the express stipulation that there shall be no dower, the contract will be valid and the law will award the woman the customary dower.”†

Customary and Specified Dower.

Anything over which *dominion* or the right of property may be exercised, or anything which may be reduced into possession, either in *presenti* or in *futuro*, anything, in fact, which comes within the meaning of the word *mâl* and has a value, may, according to the Hanafi doctrines, form the subject of dower.‡

“Anything,” says the “Fatâwa-i-Alamgîrî,”§ “that

* 2 “Hed.” (Persian Trans.), bk. i.

† Comp. the “Mafâtih,” the “Irshad-i-Allâmah,” and the “Kitâb-i-min-lâ Euhazzar al-Fakîh.”

‡ “Fatâwa-i-Kâzi Khân,” p. 425.

§ “Fatâwa-i-Alamgîrî,” p. 426.

المهر النايض بكل ما هو مال متقوم والمنافع تصلح مهرًا غير
ان الزوج اذا كان عراً وقد تزوجها علي خدمة ايها جاز النكاح
ويقتضي لها بمهر المثل *



is *mâl*, or property, and has a tangible value, is a valid subject for dower." *Munâfa* (profits accruing from land, investments, business, industry, &c.) may also form the subject of dower, excepting the man's own service, if he is a free man. If he marry stipulating to render his own services to his wife in lieu of dower, the marriage would be valid, but the woman would be entitled to the customary dower.

According to the Hanafî doctrines, therefore, the assignment of insurance policies would form a valid *mahr*.

Among the Hanafîs, if a man were to marry a woman, engaging to instruct her in religion, or to take her on a pilgrimage (in lieu of dower,) the stipulation would be inoperative, and the woman would be entitled to the customary dower.*

When something is assigned, by way of dower, which is not in existence at the time, either *substantively* or as a creation of the law, such assignment is not valid. For example, if a man were to settle on his wife, by way of *mahr*, the future produce of certain trees or lands in his possession, it would be invalid, and the woman would have a right to the usual dower. But the assignment of a *chose in action*, or the sale-proceeds of something of which he is the proprietor, would constitute a lawful *mahr*.†

Among the Shiahs and the Shâfeïs, however, a free man may assign to his wife his own services in lieu of

* 1 "Fatâwa-i-Kâzi-Khân," p. 426; "Fusûl-i-Imâdiyah."

† "Fatâwa-i-Alamgirî," p. 427.



dower.* Instruction in religion or art, an engagement to take the wife on a pilgrimage, the usufruct of property not in existence, contingent benefits, &c. may, according to the Shiah doctrine, form the valid subject of dower.†

The amount of dower or *mahr* varies in different countries; there is no fixed rule as to the maximum.‡ It depends on the social position of the parties and the conditions of the society in which they live. The "Sharâya," says, "There is no limit either to the maximum or the minimum of dower," it being a matter of contract between husband and wife; so long as the article given or assigned by way of dower possesses any definite value, the assignment is considered valid. There is no distinction as far as this principle is concerned, between the Shiahs and the Sunnis. Both schools recommend moderation in the amount of dower, but, as will be seen, this recommendation is totally disregarded by the Indian Mussulmans for reasons which have been explained in the introduction.

The early Hanafî lawyers fixed ten dirhems (equal to about five or six francs) as the minimum for

* 1 "Hed.," bk. ii. chap. 3 (Persian Trans.) ; "Sharâya," p. 290.

† "Jamâ-ush-Shattât."

‡ Musab settled a dower of 500,000 dirhems on the granddaughter of Abû Bakr. The Prophet did not enunciate any fixed rule as to the amount of dower. He expressly left it to custom and local usages; but as he appears to have settled 500 dirhems upon Maimuna, the Shiahs consider that amount to be the *mahr-i-sunnat*.



dower. The Mālikîs, inhabiting a poorer and less populous country than that in which the early Hanaffi lawyers flourished, consider three dirhems (one franc and eighty centimes) as the lowest sum which can be given by way of *sadîk* or *mahr*. This last amount was the dower which the Arab husbands, prior to the promulgation of Islām, used to give their wives as dower, besides flocks of sheep, &c. It was also the lowest sum for the theft of which the penalty of amputation was inflicted.*

These minimums have been abandoned for a long time, and it has become customary in different countries to fix the amount of dower entirely by a consideration of the circumstances of the husband and wife.

In India, for example, among that portion of the Musulman community which occupies an analogous position to the upper middle class of English society, the amount of dower ranges from 4,000 rupees to 40,000 rupees (£400 to £4,000). In Behar, the latter is, generally speaking, the customary dower; in Lower Bengal, the former. Among the lower classes the *mahr* varies from 25 rupees (£2 10s.) to 400 rupees (£40). In princely families the dower consists of several lacs of rupees.

When no dower is fixed at the time of marriage, or has not been distinctly specified either before or after

* "Études sur la loi Musulmane," par M. Vincent, p. 107. In mediæval England the theft of any article of the value of five shillings or upwards rendered a man liable to capital punishment.



marriage, or has been intentionally or unintentionally left indeterminate, the woman becomes entitled to what is called the *mahr-i-misl* "the dower of her equals," or the *customary* dower.

The customary dower of a woman is regulated with reference to the social position of her father's family and her own personal qualifications, and also, as the author of the "*Hedāya*" points out, to the dowers that have been given to her female paternal relations, such as her consanguine sisters or paternal aunts, or the daughters of her paternal uncles.

In fixing the amount, other points besides the custom which prevailed in the woman's paternal family must also be taken into consideration. For example, if one sister marry a rich, and the other, a comparative poor man, the dower of the one cannot be taken as a standard for the dower of the other. It is therefore laid down that, in order to find a proper test for the customary dower of a woman, "the *condition* of her husband in respect of wealth and lineage should be *like* that of the husband of the woman to whom *she* is compared."*

In the same way, a woman may be superior to all the female members of her father's family in intellectual attainments or personal attractions, and accordingly her dower can hardly be regulated by the *mahr* of her less fortunately endowed female relations.†

* 1 "*Fatāwa-i-Alamgīrī*," p. 428.

† The "*Hedāya*" says, "In regulating the *mahr-i-misl* of a woman attention must be paid to her equality with the women

The customary dower or *mahr-i-misl* varies, therefore, in amount according to the social position of the woman's family, the wealth of her husband, her own personal qualifications, the circumstances of the time, and the conditions of society surrounding her. No fixed rule can be laid down as to the amount of dower in any particular case; when, therefore, it is said that the dower of a woman, where no *mahr* is stipulated or specified at the time of marriage, should be the "dower of her equals," it is only intended to imply, that an approximation may be made by observing the custom which has prevailed in her father's family, provided she does not differ in intellectual capacity or personal attractions from the female relations with whom she is compared.

The same rule respecting customary dower is in force among the Shiahs. "The *mahr-i-misl* of a woman," says the "Irshâd," "is regulated by a regard to the nobility of her birth, the beauty of her person, and the custom of her female relations." To this the "Tahrîr-ul-Ahkâm" and the "Jâma-ush-Shattât" add, that "as there exist different customs in different places in respect of dower, in fixing the amount of the *mahr-i-misl*, regard must be paid to the local customs, with special reference to the

from whose dowers the rule is to be taken, in point of age, beauty, fortune, understanding, and virtue, because the *mahr* varies according to any difference in all these circumstances, and, in like manner, it differs according to place of residence or time."

1 "Hed." (Engl. Trans.), p. 148.



dowers of the women, who are the equals of the female in question, in knowledge, lineage, wealth, understanding, &c.”*

Among the Shiahs, dowers are of three kinds, viz., (1) the *mahr-i-sunnat* or traditional dower; it refers to the amount of dower adopted by Mohammed, and is said to be 500 *dirhems*; (2) the *mahr-i-misl*; and (3) the *mahr-i-mussamma*, the specified dower.

Some of the Shiah writers are of opinion that where no dower is settled at the time of marriage, and an approximation is made from the custom prevailing in the woman's family, the amount should not exceed the traditional 500 *dirhems*.

As a rule, however, dowers are always settled before marriage, and in India, especially, no condition relating to it is left for future administration.†

Mâlik has recommended to his followers the payment of the entire dower prior to the consummation of marriage, and the rule prescribed by him is practically followed in all those countries where his doctrines are in force.

As there is nothing in the Koran or in the “*Abâ-dîs*,” tending to show that the integral payment of the dower prior to consummation is obligatory in law, the later jurisconsults, says M. Sautayra, have

* *Mahr-i-misl* is presumed only in those cases when the union is legal. Mere concubinage does not give rise to the presumption of dower.—“*Jâma-ush-Shattât*.”

† There are no bounds to the amount of dower.—“*Sharâya* ;”
1 “*Fatâwa-i-Kâzi Khân*,” p. 427.



held that a portion of the *mahr* should be considered payable at once or on demand, and the remainder on the dissolution of the contract, whether by divorce or the death of either of the parties.* The portion which is payable immediately is called the *mahr-i-muajjal*,† “prompt” or “exigible;” and a wife can refuse to enter the conjugal domicile until the payment of the prompt portion of the dower. The other portion is called *mahr-i-muwajjal*,‡ “deferred dower,” which does not become due until the dissolution of the contract. It is customary in India to fix half the dower as prompt and the remaining moiety as deferred; but the parties are entitled to make any other stipulation they choose. For example, they may allow the whole amount to remain unpaid until the death of either the husband or the wife. Generally speaking, among the Mussulmans of India, the *mahr-i-muwajjal* is a penal sum, which is allowed to remain unpaid with the object of compelling the husband to fulfil the terms of the marriage contract in their entirety.

The late *Sudder Dewâni Adâlut*, of Agra, decided that when no specific portion of the dower was stipulated at the time of marriage to be exigible, the wife would be entitled only to one-third as such, and the remaining two-thirds would become due on the decease of the husband. It does not appear, from the report of that case, whether the decision proceeded upon the Shiah or the Hanafî doctrines.

* See the case of *Mehr Ally v. Amani*, 2 “Beng. L. R.,” A. C., p. 306.

† المهر المعجل

‡ المهر المؤجل



Under the Shiah law, when no time is specified for the payment of the dower, or where its nature is described only in general terms, and it is not mentioned in the contract of marriage how much is prompt and how much deferred, the whole must be considered prompt.*

Under the Hanafî doctrines, each case will be decided on its own individual merits. "When the parties have explained how much of the dower is to be *prompt*," says the "Fatawa-i-Kazi Khan,"† "that much should be promptly paid. When this has not been done, the (qualifications of the) woman and the (nature of the) dower mentioned in the contract should be taken into consideration, with the object of determining how much of *such* dower should be promptly paid to *such* woman; and the amount so determined is to be *prompt* accordingly, without regard to the proportion of a fourth or a fifth, but what is customary is also to be considered. But when it is stipulated that the whole is to be *prompt* the entire dower should be promptly paid without any regard to custom."

The decision of the Agra Sudder Court has been, to all intents and purposes, impliedly overruled by the

* "Jâma-ush-Shattât."

† ان يبينوا قدر المعجل يعجل ذلك وان لم يبينوا شيئا ينظر الي
المرأة والى المهر المذكور في العقد انه كم يكون المعجل لمثل هذه
المرأة من مثل هذا المهر فيجعل ذلك معجلا ولا يقدر بالربع ولا
بالخمس وانما ينظر الي المتعارف وان شرطو في العقد تعجيل كل
المهر يعجل الكل معجلا ويترك العرف *

1 "Fatawa-i-Kâzi Khân," p. 426; 1 "Fatawa-i-Alamgîrî," p. 448.



Allahabad High Court. In the case of *Edam v. Mazhar Hussain** and that of *Taufikunnissa v. Ghulam Kamber*, the Allahabad High Court adopted and enforced the principle of law stated in the "Fatâwa-i-Kazi Khan."

In the first mentioned case the plaintiff Mazhar Hussain sued his wife for restitution of conjugal rights. A dower of 5,000 rupees was settled at the time of marriage on the wife, but it was not stipulated how much of it should be "prompt" and how much "deferred." The wife refused to take up her abode in the conjugal domicile until the payment of the prompt portion of the dower. It was held, that in the absence of an express stipulation whether the whole dower was to be "deferred," the payment of a portion must be considered "prompt;" and the amount of such portion was to be determined with reference to custom, but when there was no custom it must be determined by the Court with reference to the status of the wife and the amount of the dower; and, as in the particular case in question, the wife had led an immoral life previous to her marriage with the plaintiff, the lower court was held to have exercised its discretion soundly, in holding that only one-fifth of the dower settled should, in her instance, be considered "prompt." The same rule was followed in the subsequent case of *Taufikunnissa v. Ghulam Kamber*.

When no settlement has been made prior to mar-

* 1 "Ind. L. R.," All. Series, p. 488.



riage, the parties may subsequently come to terms respecting the amount of it. Such dower is called *mahr-i-tafwiz*; when the amount is settled by arbitrators, or by the judge (*Hâkim-i-shara*), it is called *mahr-i-tahkîm*.

The right of property over the subject of the dower, vests in the wife, according to the Hanafî doctrines, on the occurrence of the following contingencies, viz. : (1) on the consummation of the marriage; (2) on a *valid retirement*, which among the Hanafîs is considered equivalent to actual consummation; and (3) on the death of either the husband, or the wife, before or after consummation.*

For example, if a husband consummate the marriage, the wife becomes entitled to the entire dower settled on her, and though she may realise only the prompt portion, she can make an assignment of the whole, as a specified debt against her husband. The same would be the case if, instead of consummation, there has been a valid retirement of the parties into the nuptial chamber. Likewise if the husband die, either before or after the consummation of the marriage, the wife acquires an absolute right over the whole of her *mahr*; or, if she die under the same circumstances, her heirs become entitled to the dower.

* The "Fatawa-i-Alamgîrî" says, "Dower is confirmed by one of three things, consummation, valid retirement, or the death of either husband or wife, and that whether the amount of dower be named or be the *mahr-i-misl*," p. 428.



According to the Shiah and the Shâfeî doctrines, the wife's right to the entirety of the dower vests in her only when the marriage has been consummated, or when either she or her husband have died before consummation and during the subsistence of the contract. According to these two schools, retirement without consummation does not entitle the wife to the entirety of the dower.

Under the Hanafî law, when a separation takes place between husband and wife before consummation or *valid retirement*, she is entitled to half the specified dower. But when no dower has been specified at the time of marriage she is only entitled to a present, the amount of which depends upon the usages of the country. Even when a *mahr-i-tafwîz* or *mahr-i-tahkîm* has been settled for the woman, she cannot claim a moiety of such dower, if the separation take place before consummation, but is entitled to a present only.

The Shiahs agree in the main with the Hanafîs. They also hold, that if a separation take place *before consummation*, the woman is entitled only to half her specified dower (*mahr-i-mussamma*), but they differ from the Hanafîs in holding, that where a *mahr-i-tafwîz* or a *mahr-i-tahkîm* has been settled on the wife after marriage, and the husband separates from her before consummation, she is entitled to the moiety of such *mahr*, as in the case of the *mahr-i-mussamma*.*

* "Jâma-ush-Shattât;" "Irshâd-i-Allâmah."



Among the Hanafîs, the husband is bound to make a present to a wife, from whom he separates before consummation of marriage, when no dower has been specified. It is only when the husband furnishes the cause of separation that he is liable for a present. For example, when he is separated from the wife by reason of impotency or apostacy, or when he separates himself by a *talâk*, he is under the obligation of making her a "present" (*mutat*) if there has been no consummation or *valid retirement*, and if no dower has been specified before marriage. No present is due from him, however, when the cause proceeds from the wife. If she apostatise or commit adultery, or cancel the marriage in exercise of her option on the ground of inequality, fraud, &c. she has no right to any present.*

The same principle is in force among the Shiahhs. "If the husband and the wife separate *before consummation* (*and there is no dower specified in the contract or settled afterwards*), the wife is entitled to a present which is to be regulated by the position and the means of the husband.† "No woman, however," says the "Sharâya," "is entitled to a present, except one for whom no dower has been settled, and who has become separated from her husband before consummation."‡

* 1 "Fatawa-i-Alamgiri," pp. 428-29.

† "Jâma-ush-Shattât."

‡ "Sharâya," p. 292.



Among the Shâfeîs, a present is incumbent on the husband in every case of separation.

When the right to the dower has once vested in the woman, it is not defeated or lost by any conduct on her part. For example, when the marriage has been consummated (according to the Sunnis as well as the Shiah's), or a valid retirement has taken place (according to the Hanafîs), the woman's right to her dower is not lost by her subsequent apostacy or adultery; but it would be otherwise if the apostacy or misconduct occurred before the right vested in her. In such a case the *entire* dower would fall to the ground.*

The right once vested is not lost, even if the woman murder her husband. Should she commit suicide or be killed by her husband, her right passes to her heirs.†

A woman is not entitled to any *mahr* or present under an invalid marriage, judicially dissolved upon consummation. If consummation take place before the order is made, she is entitled to the whole of her specified dower, but the case is otherwise when the union is adulterous and consequently void *ab initio*.‡

The *prompt* portion of the *mahr* may be realised by the wife any time before or after consummation; the deferred portion remains unpaid until the dissolution of the contract. But actual possession is not necessary to enable her to exercise her rights over it.

* 1 "Fatawa-i-Alamgîrî," p. 447; "Fusûl-i-Imâdiyyah;" "Jâma-ush-Shattât."

† *Ibid.*

‡ 1 "Hed." (Engl. Trans.), pp. 145-47.



Deferred dower, in fact, is a *chose in action*; a woman can assign it to anyone she chooses, and such person may recover the same on its becoming due, from the husband or his estate. The "Sharâya" says in explicit terms, "The dower becomes the property of the wife by the mere contract (when consummation has taken place), and she may deal with it in any way she likes, before she has obtained actual possession of the subject-matter." She can make a gift of the *mahr* either to her husband or to a stranger. In the former case, when she gives it to her husband, it answers as a discharge of his liability, or she may exchange it for any other property belonging to the husband. An exchange of property for dower is called a *Bai mukâsa*.

A wife, says the "Fatâwa-i-Alamgîrî," may make a gift of her dower to her husband, and none of her guardians, not even the father, has a right to object to her so doing.* She may exonerate her husband either from the payment of the whole debt, or only from part of it. In order to be valid, the exoneration must be made when she is in good health and whilst of sound mind. In India, when a woman is on a death-bed, she generally "forgives" her husband the unpaid dower-debt. It is doubtful how far such discharges, granted *in extremis*, are valid.† A dis-

* 1 "Fatâwa-i-Alamgîrî," p. 446.

† The "Fatâwa" says, "It is necessary for a discharge to be valid that she should not be sick of death illness at the time of giving her consent."—Vol. i. p. 442.



charge given by a minor wife, probably, would not be valid unless ratified by her guardian.

Under the Hanafi law, a father cannot make any abatement in his daughter's dower in favour of the husband,* but, under the Shiah law, a father or grandfather may do so, and such abatement will be valid, unless there is reason to believe it was done fraudulently.† Under no circumstances, however, can either the father or grandfather discharge the husband of a minor daughter from the *entire* debt.‡

Dower is a debt like all other liabilities of the husband, and has preference over legacies bequeathed by the testator and the rights of heirs. A partition of the estate cannot take place until the dower debt has been satisfied.

When the wife is alive she can recover the debt herself from the estate of her deceased husband. If she be dead, her assigns or representatives stand in her place and are entitled to recover the same.

Under the Mahommedan law, there is no hypothecation without seizure, and therefore a widow has no absolute lien on any *specific* property of her deceased husband so as to enable her to follow it, as in the case of a mortgage, into the hands of a *bonâ fide* purchaser for value. The widow's claim for dower is only a debt against the husband's estate, and has priority

* 1 "Fatawa-i-Alamgîrî," p. 446.

† "Jâma-ush-Shattât."

‡ "Sharâya," p. 295.



over legacies and the rights of heirs.* Where, however, she has obtained actual and lawful possession of the estate of her husband, under a claim to hold them for her dower, she will be entitled to retain possession until the debt is satisfied, with the usual liability for account to the heirs.† In the case of *Ahmed Hussain v. Musst Khadija*, the Calcutta High Court held that even where the dower was unascertained, but the widows were in possession of their deceased husband's estate in satisfaction of their *mahr*, they had a lien over it as long as any portion of the dower remained unsatisfied.‡

If a widow, who has obtained possession of a property in lieu of dower, should be dispossessed by the heir of her husband, such heir takes the property subject to her lien for dower.§

A suit for ejectment against a widow in possession of her husband's estate for dower will not lie, unless it is alleged that such dower has been satisfied.

Limitation does not run against *deferred* dower until it has become due, either by the death of one of the parties or by divorce. The prompt or exigible dower, however, is a debt always due, and demandable during "the subsistence of the marriage, and certainly payable on demand." On a clear and unambiguous de-

* *Wahedannissa v. Shubratun*, 6 "Bengal Law Reports," p. 54.

† *Bachun v. Hamid Hussain*, 10 "Bengal Law Reports," P.C.C., p. 45.

‡ 3 "Bengal Law Reports," A.C., p. 28 note.

§ *Umed Ally v. Safhan*, 3 "Bengal Law Reports," A.C., p. 175.



mand for payment of dower by the wife, and its refusal by the husband, it has been held by the Judicial Committee of the Privy Council, that a cause of action accrues, against which limitation would begin to run. When there has been no explicit demand on the wife's part, limitation will not affect her claim with reference to the exigible dower. The wife has an absolute option to demand the *mahr* during the lifetime of her husband, and to elect her own time for demanding it.*

A woman may refuse to take up her abode in the conjugal domicile without previous payment of the "prompt" dower. In the case of *Edun v. Mazhar Hussain*, the Allahabad High Court held that, where a wife's dower is prompt, she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him until he has paid her her dower, and that she is not precluded from doing so by the mere fact of having consented to cohabit with him since the marriage.

This latter view is in accordance with the teachings of Abû Hanîfa,* but his disciples differ from him on the point whether a woman can refuse restitution of conjugal rights until the "prompt" dower is paid, if once she has been led into the nuptial chamber, or the marriage has been consummated. There are two opinions among the Shiahs, but the prevalent doctrine

* *Khajurunnissa v. Saifullah Khan*, 15 "Bengal Law Reports," A.C., p. 306. See also *Khajurunnissa v. Raisunnissa*, 5 "Bengal Law Reports," p. 84, where the claim was held barred.

† 1 "Fatawa-i-Alamgiri," p. 458.



is that, when a woman has once cohabited with her husband, she cannot subsequently refuse him conjugal rights on the ground of the non-payment of the *exigible mahr*,* though she may sue her husband for it at any time during his lifetime.

When the husband settles on the wife any property in exchange for the dower, or, to use the language of the "Fatâwa," "sells her a chattel for her dower," she may similarly refuse cohabitation until such chattel or such property has been delivered to her.

When the property settled on the wife is lost before delivery, or a claim is established by a third person with reference to it, the husband is bound to give her a property of equal value. If the property settled be of inferior value than was alleged, the wife may, before consummation, insist on compensation or a change of the property. After the marriage has been consummated, she is supposed to have waived her right to compensation.

Miscellaneous Principles concerning Antenuptial Settlements.

We have seen already that, in pre-Islâmic times, it was an essential condition to the validity of a marriage, that the husband should settle on the wife a certain dower, which became her exclusive property. Such at least was the established custom, though owing to the absence of an organised system of law or justice,

* "Jâma-ush-Shattât."



the custom was often more honoured in its breach than in its observance.

From contemporary records, it would appear that the Arab husbands, in spite of the qualified custom which prevailed among the tribes, frequently despoiled their wives, and turned them adrift on the world absolutely helpless and without means. These acts of injustice were expressly forbidden by the Koranic teachings. It was declared to the Arabs, "If you separate yourself from your wives, send them away with generosity; it is not permitted to you to appropriate the goods you have once given to them."*

The Jewish tribes settled in Arabia followed a different system. Among them, both the dower and the property which the wife brought with her remained in the hands of the husbands until the dissolution of the contract.†

The Mussulman law accepted in this matter the more liberal principle of the pre-Islâmic Arab customs. There is no community of goods under the Islâmic system between husband and wife. She is absolute owner of her own property and whatever the husband settled on her as dower. The terms of the settlement are agreed to before marriage, but when these have been omitted they may be settled subsequently. The terms of the contract may be varied at any time during the continuance of the marriage by mutual

* Koran, chap. ii. v. 229.

† "Code Rabbinique," Ebn Haezer, Vol. II. pp. 10, 88 and 154.



consent of the parties. The wife has the power either to relinquish the whole dower debt, or make an abatement in her husband's favour; whilst the husband similarly has the power of making additions to her settlement or dower.

The amount of the dower, as already pointed out, is either settled by the contract of marriage or by custom, or, in the case of *tafwiz* or *tahkim*, by a subsequent agreement between the parties, or by an order of the judge, or arbitrators.

When the dower has been specified in the deed of marriage, and where the language of the document is precise and clear, no difficulty can possibly arise. When the terms are vague, obscure, or contradictory, the *Hâkim* has to interpret them by a reference to the *presumed intention* of the parties, although the jurists have attempted to cast a light on the subject by framing certain somewhat arbitrary rules to regulate the mode of interpretation in such cases. For instance, Abû Yussuf says, that when a man is possessed of two things of unequal value, and settles upon his wife one of them, without sufficiently specifying which one is intended, the woman will be entitled to the article which is of the lesser value.* In the same way he holds that where a man settles on his wife a certain chattel the nature of which is described, but not the value, she is entitled to a chattel of medium value.

* 1 "Hed.," p. 139.



Shâfeî thinks that in such a case the customary dower should be accorded to the wife.*

When a man settles thirty *dinârs* on his wife, and declares in the marriage contract that ten *dinârs* shall be considered "prompt," and ten "deferred," it has been held that twenty *dinârs* shall be taken as the stipulated dower.

When the specific contract is admitted on both sides, little or no difficulty arises on the adjudication or re-justment of any question concerning dower, arising either during the lifetime of the parties or after their decease. When, however, one of the parties denies the execution of the contract, or alleges that it was obtained by force or fraud, or when it is stated that the contract entered into at the time of marriage has been modified or substituted for another, the question of dower becomes involved in difficulty, and it is necessary to consider the rules adopted by the Mus-sulman jurists for the settlement of disputes regarding the *mahr*.

The "Kifâyèh" says, "Disputes regarding the dower may take place between the married parties themselves in their lifetime, or between their heirs when both are dead, or, after the death of one of them, between his or her heirs and the survivor. When the disputes arise in the lifetime of the parties, it must be either before or after divorce; and in all cases, the disputes may relate either to the amount

* 1 "Hed.," p. 141.



of the specified dower or to the fact of any dower having been specified in the contract.”*

As we have stated before, it is not necessary that the contract of marriage should be reduced to writing, and the “*Fatâwa-i-Alamgîrî*” goes so far as to say that “if a husband refuse to give a writing for the dower, he may not be compelled to do so.”† A verbal contract of marriage and a verbal undertaking for dower are as valid in law as a written contract.

As it is now customary, in almost all civilised Muslim communities, to reduce into writing the terms of a marriage contract, prior to the celebration of the marriage, the instances of “the disputes relating to dower,” given by the older jurists, have more an anti-quarian than a really practical interest. They are not, however, entirely without value, for, even in India, cases sometimes occur, where the dower depends upon a mere verbal stipulation between husband and wife.

When the contract of marriage is embodied in writing, which mentions specifically the amount of dower settled on the wife, the husband cannot disavow it and allege that he did not intend to make the settlement in question, but something totally different, unless he avers that the amount entered in the deed was done fraudulently.‡

When there is no written contract and “a dispute arises between the married parties any time during

* 1 “*Kifâyeh*,” p. 86; 1 Baillie, p. 130.

† 1 “*Fatâwa-i-Alamgîrî*,” p. 454.

‡ 1 “*Fatâwa-i-Alamgîrî*,” p. 454; “*Jâma-ush-Shuâtât*.”



their marriage regarding the amount of dower," the *mahr-i-misl* of the woman must be taken as the standard by which the respective allegations of the husband and the wife are to be tested.

For example, if the wife were to allege that a sum of £500 was settled on her and the husband were to say that £250 only was so fixed, it must be ascertained what the woman's customary dower would be. If it be not less than £500, the probability would be that the allegation of the wife accorded with fact.*

The same principle would be adopted, in case the dispute arose subsequently to the death of one or both of the parties, that is, where it is impossible to ascertain what the exact dower is, the wife or her heirs, as the case may be, should be held entitled to the customary dower or *mahr-i-misl*.†

This, however, refers to cases where no proof is obtainable on either side as to the amount of dower settled at the time of marriage. When a woman can establish presumptive grounds for coming to a different conclusion, and for holding that she is entitled to more than her *mahr-i-misl*, she is not debarred from doing so.

The Court of Algiers enforced this principle in a case reported by M. Sautayra. A person died leaving three widows, two of whom established conclusively their right to dower. The third could offer no proof, but there was nothing to indicate that the amount of

* 1 "Fatawa-i-Alamgiri," p. 451.

† *Ibid.*, pp. 451, 452; "Jâma-ush-Shattât."



her dower was less than those of the two first wives. The Court held with the Kazi who decided the case in the first instance, that she was entitled to the same *sadâk* as the others.

When the amount of dower is entered in writing, but the husband alleges that it was obtained by force or fraud, the onus of proving this rests on him. When an allegation is made on behalf of the wife, that she was married in consideration of a higher dower than that actually entered in the writing, the burden of proving it would be thrown on her.

Cases frequently occur where a marriage is contracted privately and verbally for a small amount of dower, whilst a much larger amount is stated before the public, or entered in the deeds of marriage. It has been held that the amount publicly stated, or entered in writing shall be considered the legitimate dower.*

When a *wakîl* or mandatary accepts a commission to arrange a contract of marriage and to stipulate for a certain dower, if he exceed his authority and fraudulently increase the dower, the husband is only liable for it if he should have had any suspicion of the fraud before he consummated the marriage. If, before consummation, the woman knew of the fraud of the husband's agent, she would be entitled only to the sum for which the authority was actually given. If

* 1 "Fatawa-i-Alamgirî," p. 448; "Fusûl-i-Imâdiyyah;" "Jâma-ush-Shattât;" see the cases in 1 S. D. A. Rep., p. 279, and 2 S. D. A. Rep., p. 199 (Calcutta).



both parties were aware of the fraud, then the husband would be liable for the whole amount.

When it is alleged that the first contract has been modified by a subsequent one, the onus rests on the party making the allegation.*

When a dower is specifically mentioned in the contract of marriage, and the husband separates from or divorces his wife before consummation, the wife is entitled to a moiety of the dower. If no dower is fixed at the time of marriage, a woman is entitled to a moiety of her *mahr-i-misl*.†

A woman is not entitled to any dower in the following cases, *provided the separation take place before consummation* :—

(a.) When two minors contract themselves in marriage without the consent of their guardians, and the marriage is cancelled at the instance of the latter.

(b.) When a marriage contracted for minors is cancelled by them in exercise of their right of option.‡

(c.) When the marriage is cancelled by order of the judge, for any cause which gives a right of option to the parties.§

(d.) When a man enters into a contract of marriage whilst labouring under an illness which comes within the meaning of death-illness, and dies from that illness before consummating the marriage.

If the wife, however, was suffering from some illness

* Mohammed Assem, "Traité de Mariage," traduction par Bourdens Lasalle, ch. ii.

† See chapter on Marriage.

‡ See *Ibid*.

§ See *Ibid*.



at the time of marriage which prevented consummation and eventually caused her death, her right to the dower would be transmitted to her heirs.

If a father contract his minor son in marriage for a certain dower, and the son die without leaving any property, the father would be liable to the wife for such dower.*

As we have already seen, the husband has the power of making an addition to the dower during the subsistence of the marriage, just as the wife may make an abatement. Among the Shâfeis, such addition is regarded as a *gift*, and as, under the Mahommedan law, no gift is valid without siezin, any addition made by the husband to the dower requires that delivery thereof should be made at the time to the wife.

Among the Hanafîs and the Shiahhs, the *addition* is not regarded in the light of a *gift* or *hiba*, and does not therefore require delivery of siezin at the time the addition is made to render it valid. "It is," says the "Hedâya," "an alteration of the terms of the contract in a non-essential matter within the power of the parties, and, like an addition to the price in sale, becomes incorporated with the original dower."†

When a separation takes place before consummation the wife is not entitled to the benefit of any post-nuptial settlement, or "additions made to dower after marriage."

* "Jâma-ush-Shattât."

† 1 "Hed." (Eng. Transl.), p. 127, and 2 "Hed." (Eng. Transl.), p. 485. Comp. the "Kanz-ud-Dakâik."



The trousseaux of a bride is provided by her father. How far he has a right to recover any money he has expended on it from the dower of his daughter, depends upon the customs prevalent in the community where the question arises. For example, in Algeria it has been held that the father is not bound to provide his daughter's trousseaux, and if he do so he may recoup himself from the dower which she receives on marriage. In India, the bride's father is bound to furnish her with a wedding outfit, unless he is in straitened circumstances, when the obligation rests with the husband. When a man advances a sum of money towards the trousseaux of his future wife,* it is obligatory on the father, if he be possessed of means, to do the same or contribute such an amount as is customary.† The *paraphernalia*, which a bride brings with her from her father's home, is called *jahâz* (or *jahêz*), and remains her absolute property and *peculium* over which the husband has no control. The marriage outfit provided by the bridegroom becomes likewise her exclusive property.

The expenses of the marriage feast are defrayed by the bridegroom. The wife has to contribute nothing towards the support of the household.

The property of the married parties is always distinct. Originally, and at the commencement of the

* This is called the *Dust-i-pymân*.

† "Jâma-ush-Shattât;" "Muhît-i-Sarakhsî." "The proper ratio of *Jahâz*," says the "Fatawa," is that for every *dinâr* of the *dust-i-pymân* there should be three or four *dinârs* of the *Jahâz*."



married life, it is easy to distinguish which part of it belongs exclusively to the wife and which to the husband. Later, and after the husband and wife have lived together in one conjugal domicile, it becomes difficult to distinguish the property of the one from the property of the other. Should a dispute then arise between the parties, or, after their decease, between their respective heirs, regarding the household effects of the common domicile, then, in the absence of any direct proof, the presumption of law is that the "things which by custom appertain to women" will be considered as the wife's property, and those "which appertain to men" will be the husband's. The right to what is appropriate to *both* will be decided with reference to local usage or custom.*

* According to Abû Hanîfa, whose views have been enforced in several cases by the Hanafî Kazi of Algiers, "everything which is regarded as having been necessary or useful to the household (*tout ce qui est regardé comme ayant été nécessaire ou utile au ménage commun*) belongs to the survivor." Comp. the "Fatâwa-i-Kâzi Khân" and Imâdiyah on this point.

CHAPTER XI.

DISSOLUTION OF THE MARRIAGE CONTRACT.—PRE-ISLÂMIC INSTITUTIONS.—TALÂK.—DIFFERENCES AMONG THE SCHOOLS.

AMONG all the nations of antiquity the power of divorce was regarded as a natural corollary to the marital right. Originally this power was exclusively vested in the husband, and the wife was under no circumstance entitled to claim a divorce.

The progress of civilisation and the advancement of ideas led to a partial amelioration in the condition of women. They too acquired a qualified right of divorce, which they were never backward in exercising freely, until the facility with which marriages were contracted and dissolved under the Roman emperors passed into a byword.

Under the ancient Hebraic law, a husband could divorce his wife for any cause which made her disagreeable to him, and there were few or no checks to his arbitrary and capricious use of this power.



Among the Athenians as well as the early Romans, the husbands' right to repudiate the wife was as unrestricted as among the ancient Israelites.

In later times, amongst the Hebrews, the Shammaites to some extent modified the custom of divorce by imposing certain restrictions on its exercise, but the school of Hillel upheld the law in its primitive strictness.

At the time of Mohammed's appearance, the Hillelite doctrines were chiefly in force among the Jewish tribes of Arabia, and repudiations by the husbands were as common among them as among the pagan Arabs.

In some few exceptional cases, both among the Arabs and the Jews, the women of noble families would, before marriage, reserve to themselves the power of divorcing their husbands, and when they exercised the faculty reserved for them, they announced the separation by merely changing the position of their tents, which conveyed a sufficient intimation of the fact to the repudiated husbands.*

The reforms of Mohammed marked a new departure in the history of Eastern legislation. The Mussulman law of divorce is the logical sequence of the status of marriage. As it regards marriage as a purely civil contract, it confers on both the parties to the contract the power of dissolving the tie or relationship under certain specified circumstances.

* Perron, "Femmes Arabes."



Technically, the power of the husband is greater than that of the wife ; but, virtually and in practice, it is restrained within reasonable bounds by the numerous formulæ which are attached to its exercise, and by the special dicta of the Prophet.

“The law,” says Ibrâhim Halebî, “gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy ; but in the absence of serious reasons, no Mussulman can justify a divorce either in the eyes of religion or the law. If he abandon his wife or put her away from simple caprice, he draws upon himself the divine anger, for “The curse of God,” said the Prophet, “rests on him who repudiates his wife capriciously.”*

The pre-Islâmic institution of divorce required no formula to make its action valid, and as there was no check on the irresponsible power of the husband, a simple intimation from him to the effect that the tie was dissolved was considered sufficient.

The Arabian legislator, in regulating the law of divorce, imposed several conditions on the exercise of the faculty possessed by husbands, with the object of protecting women as much as possible from being thrown on the world at the mere caprice of the man. He also gave to the woman the right of dissolving the contract under certain circumstances.

When the dissolution of the marriage tie proceeds from the husband, it is called *Talâk*.

* Comp. D'Ohsson, vol. iii. p. 79.



When it takes place at the instance of the wife, it is called *Khulâ*.

When it is by mutual consent, it is called *Mubârât*.

In all these cases no decree of the judge is necessary to dissolve the union. The mere act of the parties is sufficient in law, provided all the conditions required for effecting a valid divorce are complied with.

There are other cases, however, in which the judge is authorised to dissolve or cancel the union, on the application of either the husband or the wife.

Talâk.

Two kinds of *talâk* are recognised by the Sunnis, viz. (1) the *talâk-i-sunnat* and (2) the *talâk-i-bidat* or *talâk-i-badâi*. The *talâk-i-sunnat* is the divorce which is effected in accordance with the rules laid down in the traditions (the *sunnat*) handed down from Mohammed. It is, in fact, the mode or procedure of *talâk* which seems to have been approved of by him, and is consequently regarded as the regular or proper and orthodox form of divorce.

The *talâk-i-bidat*, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Mahommedan era. It was then that the Ommiaide tyrants, finding the checks imposed by Mohammed on the facility of repudiation galling, looked about for some escape from the strictness of the law, and found in the pliability of the jurists a loophole.



The Shiahhs and the Mālikīs do not recognise the validity of the *talāk-i-bidat*, whilst the Hanaffīs and the Shāfeīs agree in holding, that a divorce is effective, if pronounced in the *bidat* form, "though in its commission the man incurs a sin."

The *talāk-i-sunnat* is either *ahsan* or *hasan*—*very proper* or *simply proper*. In the *talāk-i-sunnat* pronounced in the *ahsan* form, the husband is required to submit to the following conditions, viz. (1) he must pronounce the formula of divorce *once, in a single sentence*; (2) he must do so when the woman is in a state of purity (*tahr*), and there is no bar to conubial intercourse; and (3) he must abstain from the exercise of conjugal rights, after pronouncing the formula, for the space of three months. This latter clause is intended to demonstrate, that the resolve, on the husband's part to separate from the wife, is not a passing whim, but is the result of a settled determination; on the lapse of the term of three months, or three *tahrs*, the separation takes effect as an irreversible divorce.

In the *hasan* form, the husband is required to pronounce the formula three times, in succession at the interval of a month, during the *tahr* of the wife. When the last formula is pronounced the *talāk* or divorce becomes irreversible.* These two forms alone as stated before, are recognised by the Shiahhs.†

* 1 "Fatāwa-i-Alamgīrī," p. 492.

† "arāya;" "Mafātih;" "Jāma-ush-Shattāt."



In the *talâk-i-bidat*, the husband may pronounce the three formulæ at one time, whether the wife is in a state of *tahr* or not. The separation then takes effect definitively after the woman has fulfilled her *iddat*.

Both schools allow recantation; that is, a husband who has suddenly and under inexplicable circumstances pronounced the formula against his wife, may recant any time before the term of three months has expired. When the power of recantation is lost, the separation or *talâk* becomes *bâin*; whilst it continues, the *talâk* is simply *rajâi* or reversible.

When a definitive and complete separation (*talâk-i-bâin*) has taken place, the parties so separated cannot remarry without the formality of the woman marrying another man and being divorced from him, as mentioned before.

Sautayra and Sédillot* agree with the Mahommedan jurists in thinking, that this rule was framed with the object of restraining the frequency of divorce in Arabia. Sédillot speaks of the condition as "a very wise one," as it rendered separation more rare, by imposing a check on its frequent practice among the Hebrews and the heathen Arabs of the Peninsula. Sautayra says that the check was intended to control a jealous, sensitive, but half cultured race, by appealing to their sense of honour.†

* Sédillot, "Hist. des Arabes," p. 85; comp. Syud Ahmed Khân's Ess., iv. p. 14.

† Sultan Khudâ Bendêh Uljâitu Khan's conversion to the Shiah doctrines is ascribed to his unwillingness to allow his wife, from



As a general rule, the power of *talâk* under the Sunni doctrines is larger than under the Shiah law. "Marriage," says the "Sharâya," "being an act of chastity favoured by the law, and in its action not admitting of dissolution, it is necessary in taking off or removing the tie to adhere strictly to the terms of legal permission," i.e. the formalities imposed by the law.*

The conditions which surround the power of *talâk* under the Shiah law, and limit its exercise, are accordingly stricter and far more rigid than under the Sunni law.

According to the Sunni doctrines, *talâk* may be effected *expressly*, in terms which leave no doubt as to the intention of the repudiator (*sarîh*), or by the use of ambiguous or implicative expressions (*bîl-kinâyèh*).†

According to the Shiahs, repudiation pronounced "implicatively," or in ambiguous terms, does not take

whom he had separated in a fit of passion by an irregular divorce, to submit to the ordeal of a marriage with another. Certain rationalistic schools, notably that of the Mutazalas, think that the following passage of the Koran abrogates the condition laid down in the verse immediately preceding it: "When ye divorce women," says the passage referred to, "and the time for sending them away is come, either retain them with generosity or send them away with generosity; but retain them not by constraint so as to be unjust towards them." Comp. also the "Bahâr-ul-Anwâr" and the *Mishkât in loco*. They also hold that no dissolution of the marriage is valid without the sanction of the *Hâkim-i-Shara*.

* "Sharâya," p. 314.

† 1 "Fatâwa-i-Alamgîrî," p. 500; 2 "Fatâwa-i-Kâzi Khân," p. 33.



effect, whether there be intention on the part of the repudiator or not, nor does it take effect if it be made dependent upon or subjected to any condition.*

Besides the divergence existing between the Shiah and the Sunnis regarding express and implied *talâks*, there is a marked difference between the two schools in respect of the *capacity* for repudiation. The Shiah hold that in order to pronounce a valid *talâk* the repudiator must not only be "adult and sane," but must act of his own free will, and with knowledge and comprehension of the nature of what he is doing.

The Sunnis, generally speaking, regard a repudiation pronounced by a person who is *sui juris* as valid in law, without requiring him to fulfil any other conditions.

Capacity of Talâk.

Under the Shiah law there are four conditions essential to the *capacity* of pronouncing a valid *talâk*. It is required (1) that the husband should have attained majority; (2) that he should be sane and possessed of sound understanding; (3) that he should act of his own free will; and (4) that, on his part, there should be a distinct intention to dissolve the marriage tie.

A boy, who has not arrived at the age of puberty, is precluded from effecting a dissolution of the matrimonial contract, by pronouncing the *talâk*, as also an insane person. There is, however, this difference

* "Jâma-ush-Shattât;" "Sharâya," p. 314.



between the case of a person who is a minor, and one who is disqualified by reason of insanity, that whereas the guardian of a minor husband has no authority to supply his ward's place in order to effect a valid repudiation, the guardian of a *confirmed* lunatic is authorised to do so. When the lunatic has no guardian, the Kâzi or judge can make a decree to dissolve the tie. The reason of this difference consists in the fact that the disability of age is temporary, whereas lunacy is usually permanent. The difficulty, therefore, which was felt under the English law, in the case of *Barker v. Barker*, where the husband being insane a divorce was sought by his Committee on the ground of the wife's adultery, cannot arise under the Shiah law.

Repudiation pronounced under compulsion is invalid and ineffective under the Shiah law. In order to invalidate a *talâk* on the ground of its having been pronounced under compulsion, three conditions are requisite: (1) that the "compeller" is able to do what he threatens; (2) that there is a strong probability of the threat being carried into effect; (3) that the threat involves some imminent and serious danger to the "compelled" person himself or to some one dear to him. "A trifling injury," says the "Sharâya," "is not sufficient to establish compulsion."*

A repudiation obtained by fraud, or given under undue influence, is also invalid under the Shiah law.

* "Sharâya," p. 316; see the "Jâma-ush-Shattât;" "Irshâd-i-Allâmah."



Intention is a necessary element to the validity of all *talâks*; where this essential condition is wanting, though the *talâk* may be pronounced in *express* terms, yet it has no effect.* But, even where there is actual intention, the repudiation must be formulated in *express* and *unequivocal* terms, or the entire proceeding would be invalid.

A *talâk* pronounced by a person in a state intoxication, or by one labouring under a temporary stupor from the use of some narcotic, or any other cause, is likewise invalid. So also is the case of *talâks* given by mistake or inadvertance, in anger or in jest, or when the words have fallen whilst talking in sleep.†

Among the Sunnis, the power of repudiation belongs in principle to every husband who is adult and sane. This power is certainly greater in the Hanafî than in any other Sunni school.

According to the Hanafî doctrines, “*talâk* pronounced by any husband who is of mature age (*bâligh*) and possessed of understanding (*âkil*) is effective, whether he be free or a slave, willing or acting under compulsion;‡ and even though it were uttered in sport or jest, or inadvertently by a mere *slip of the tongue*.”§

Among the Hanafîs, a *talâk* pronounced by a man whilst in a state of intoxication is “effective,”

* “*Jâma-ush-Shattât*.”

† “*Jâma-ush-Shattât*,” “*Irshâd-ul-Allâmah*.”

‡ 1 “*Fatâwa-i-Alamgîrî*,” p. 497 (after the *Jowharât un-nâirêh*).

§ *Ibid* (after the *Mukhî*).

unless the liquor or the drug which caused the intoxication, was administered against his will, or was taken "for a necessary purpose," *i.e.*, medically.*

According to Al Karkhî and Tahâvî, the *talâk* of a man so drunk as to be totally unconscious of what he is doing is invalid in law. Though Shâfeî himself seems to have held the same opinion as Al Karkhî,† his followers agree with the Hanafîs in holding, that a repudiation pronounced by a drunken man is effective.

The Mâlikîs, however, agree with the Shiahhs in regarding such repudiations as absolutely invalid. The Mâlikî doctrine was laid down with great clearness and precision in a case decided by the Kâzi of Tlemcen in Algeria, and reported by Sautayra. In that case the wife applied for a divorce against her husband, on the ground that he had pronounced a *talâk-i-bâin* against her. The husband in defence stated that he was not aware of having pronounced a *talâk*, as at the time of the alleged repudiation he was in a state of intoxication. The witnesses cited by the parties proved that the *talâk* was actually pronounced, but that the husband was drunk at the time. The Kâzi dismissed the wife's petition, holding that the

* 2 "Fatawa-i-Kâzi Khân," p. 33. Abû Yusuf and Abû Hanîfa were of opinion that the divorce of a man who became intoxicated on fermented liquors obtained from grain or honey would not be effective. Imâm Mohammed, however, differed from them, and his view is in force among the Hanafîs. The *talâk* of a person who is suffering from intoxication under the effects of *bhâng* or *ganja* would be effective; 1 "Fatawa-i-Alamgîrî," p. 498.

† 1 "Hed," p. 211; 2 "Fatawa-i-Kâzi Khân," p. 33.



talâk was ineffective, as the man was in a state of inebriety when he uttered the formula constituting the basis of the charge.

There is great divergence among the several Sunni schools with reference to a repudiation obtained or extorted from an individual by compulsion, or under the influence of threats. The Hanafîs, as mentioned before, are of opinion that a *talâk* pronounced under compulsion is as valid as one given voluntarily.

The Shâfeîs hold a diametrically opposite view. They agree with the Shiahhs in considering that the husband who acts under the influence of threats of violence is not a free agent, and consequently his *talâk* has no validity in law. Shâfeî, the founder of the school, expressed this in terms which are given with some particularity in the "Hedâya." He says "that the *talâk* of a man acting under compulsion is not effective, because a person who is *compelled* has no option, and no formal act of law is worthy of regard, unless it be voluntary; contrary to the case of one speaking in jest, who, in mentioning divorce, acts from *option*, which is the cause of its validity."*

The answer of the Hanafî doctors to these pertinent remarks of, probably, the most rigid of all the Sunni jurists is worthy of note. "Our doctors," says the author of the "Hedâya," "allege that the person here mentioned pronounces divorce under circumstances of complete competency (maturity of age and

* 1 "Hed.," bk. iv. ch. i. (Persian Trans.)



sanity of intellect), the result of which is that the divorce takes effect equally with that of a person *uncompelled*. . . . The foundation of this is that the man (who acts under compulsion) has the choice of two evils—one, the thing with which he is threatened or compelled, and the other, the divorce under compulsion; and viewing both, he makes a choice of that which appears to him the easiest, namely, divorce, and this proves that he has an option.”*

In the case of *Ibrahim Moolla v. Enayet ur Rahman*, the High Court of Calcutta held that the divorce of one “acting under compulsion is effective.”† The principle, however, enunciated in this judgment ought to be confined exclusively to the Hanafîs.

Supposing a Hanafî, under the influence of threats and strong coercion, pronounces a *talâk* against his wife, and on recovering his freedom of action, disavows the validity of his act, and places himself under the Shâfeî rules to escape from the results of the *talâk*, there can be little doubt that he would be justified in doing so, and the repudiation he had pronounced would be invalidated.

The Mâlikîs follow the same rule as the Shâfeîs. According to them, “the fear of punishment, the threat of death, violence, or imprisonment to the

* 1 “Hed.” (English Trans.), p. 149. This translation is involved and hardly clear. The author has, nevertheless, thought it advisable to adhere to Mr. Hamilton’s language instead of translating the passage himself.

† 12 “Sutherland’s Weekly Reporter,” p. 460.



husband himself, or to anyone whom he holds dear, renders the repudiation ineffective.”*

As regards the character of the compulsion which is held to invalidate a *talâk*, the Mâlikîs and the Shâfeîs agree with the Shiahs in holding, that it must be such as to influence the conduct or frame of mind of a reasonable man.

All the Sunni jurists agree that the repudiation of a boy under puberty, though possessed of understanding, is ineffective.”†

“If a youth under puberty should repudiate his wife, or another person should do so on his behalf, and the youth, on attaining majority, should ratify what was done while he was a minor, such ratification must be worded in the form of a repudiation *de novo*, and not simply as a confirmation of what had occurred previously.‡

The *talâk* of one who is insane or afflicted by pleurisy is invalid. So also, if a person pronounce a repudiation, whilst asleep or unconscious (*madhûsh*) or lost in astonishment, no legal effect will be attached to it.§

If a lunatic with lucid intervals, pronounce a *talâk* whilst the fit is on him, it is ineffective; but it would be valid if given in a lucid interval.||

* “Kitâb-ul-Anwâr.”

† 1 “Fatâwa-i-Alamgîrî,” p. 498 (after the *Fath-ul-Kadîr*); “Kanz-ud-Dakâik;” “Fusûl-i-Imâdiyah.”

‡ 1 “Fatâwa-i-Alamgîrî,” p. 498; “Bahr-ur-Râik.”

§ 1 “Fatâwa-i-Alamgîrî,” p. 498; “Kanz-ud-Dakâik;”

2 “Fatâwa-i-Kâzi Khân,” p. 29.

|| *Ibid.* All these refer to the Sunni doctrines.



Among the Sunnis, "a repudiation cannot be qualified by option." Thus, if a person were to say to his wife, "I have *talâked* you, but I reserve to myself an *option* for three days," the repudiation is valid, but the option invalid. If a repudiation be pronounced conditionally, or be made dependent on the occurrence of a contingency not impossible in its nature, the condition is valid, the *talâk* taking effect only when the condition is fulfilled.

The Shiabs, on the other hand, regard all *talâks* to which an option or a condition is attached, as absolutely void.*

They do not allow a *talâk* to be given in writing, nor in any other language than the Arabic, when there is ability to pronounce the words necessary for a valid repudiation; nor can a *talâk* be effected among them by signs unless the husband is dumb.† A person who is dumb may give the repudiation in writing, but one who is able to speak is not allowed to do so. Even an absent husband cannot effect a valid *talâk* in writing.‡ The Sunnis, on the contrary, hold that "a *talâk* may be effected by writing as well as words."§

Writings, among them, are said to be of two kinds, viz. *marsûm* (customary) and *ghair-marsûm* (not customary). When repudiation is given by a writing of the description called customary, it is effective,

* "Jâma-ush-Shattât."

† "Mafâtih."

‡ "Jâma-ush-Shattât."

§ 1 "Fatâwa-i-Alamgîrî," p. 499.



even when there is no real intention on the part of the husband to divorce the wife. In the case of non-customary writings, if there is any ambiguity, the *talâk* does not take effect; when there is no ambiguity and the meaning of the writer is "manifest," the repudiation is valid.*

It is not necessary for the husband himself to pronounce the *talâk* in the presence of the wife, but it is necessary that it should come to her knowledge. When there is no evidence to show that the *talâk* came to her knowledge, or that the writing (if the repudiation was under the Sunni law) was delivered and its purport and effect explained to her, the Presidency Magistrates' Courts in Calcutta have invariably held that the repudiation was invalid and ineffectual in law.

Under the Shiah law, it is further necessary that there should be two reliable witnesses present at the time of repudiation, to hear the words in which it is pronounced, or in the case of a dumb individual, to see the writing or the signs in which it is expressed. Not only must witnesses be present at the time, but they should understand the nature of the act and hear the distinct wording of the repudiation. If they be unable to testify to the exact character of the *talâk*, or the words or signs used, it is invalid, although all other conditions may have been duly complied with.

It is a further condition under the Shiah doctrines that the witnesses should be present *together*. The

* 1 "Fatâwa-i-Alamgîrî," p. 533; 2 "Fatâwa-i-Kâzi Khân," p. 29.



Shiah law is so exact in the matter of repudiation, and throws so many obstacles in the way of a dissolution of marriage by this process, that it declares that if one of the witnesses should be present at one stage and the other at another stage of the proceeding, the *talâk* would not be valid. When they testify to the acknowledgment by the wife of a repudiation, it is necessary that their testimony should be concordant, or relate to one and the same time, or "be given together." "Yet," says the *Sharâya*, "if *one* should testify to the *fact* of repudiation and the *other* to the *acknowledgment* of it, their testimony would not be admissible."*

When a *talâk* is pronounced in the presence of witnesses, it takes effect only, when the appropriate words are employed. If a husband were to repudiate his wife first without witnesses, and then in their presence, the former proceeding would count for nothing. The obligations would spring from the date of the second *talâk* if valid.

The Sunnis, on the contrary, do not require the presence of witnesses. As long as the repudiation comes to the knowledge of the wife, it is considered sufficient and valid in law.

Under the Shiah law, a *talâk*, pronounced in a paroxysm of anger, during which all self-control is lost, is invalid. Under the Sunni law it is valid.

The Sunnis allow the use of an infinite number of

* 1 "*Sharâya*," p. 316. Comp. the "*Jâma-ush-Shattât*."



formulae—some obvious in their meaning, others conveying the intention only implicatively—for the purpose of effecting a *talâk*.* The Shiâhs recognise only two as effectuating a valid repudiation. The use of any other formulae, whether explicit or ambiguous, renders the proceeding void.

It has been held by the Calcutta High Court, in accordance with the Hanafî doctrines, that the mere pronouncement of the word *talâk* three times, without its being addressed to any person, is not sufficient to constitute a valid divorce.†

As the principle contained in this decision is inherent in the Shiah doctrines, which insist that a *talâk* in order to be effective should specify the particular person to whom it is addressed, the ruling would apply equally to Shiâhs and Sunnis.

Legal effects of Talâk.

In the consideration of the question of *talâk*, it is necessary to bear in mind the difference as to the legal effects which arise from the form in which the formulae are pronounced. It has been already stated, that *talâk* in view of the legal consequences arising from it, is either *bâin* (complete or irreversible) or *rajâi* (incomplete or reversible). *Talâk-i-bâin* involves a definitive dissolution of marriage, without reservation

* For these formulae see 1 "Fatâwa-i-Alamgîrî," pp. 520-33; 2 "Kâzi Khân," pp. 2-33; 1 "Hed.," pp. 147-50.

† *Furruṇḍ Hussian v. Jana Bibi*, 4 "Ind. L. R.," Cal. Series, p. 588.



of the power of retraction. In the *talâk-i-rajâi* the husband has the option of resuming connubial intercourse. A *talâk-i-bâin* takes effect immediately after the formulæ are pronounced, under the following circumstances:—(1) when there has been no cohabitation; (2) when there is inability, by reason of tenderness of age on the part of the wife, or from old age, to connubial intercourse; (3) when the parties have dissolved the tie by mutual agreement.

The retractation or recantation in the case of *talâk-i-rajâi* is called *rajat*.

If the *rajat* is effected by words, the testimony of witnesses is admissible in evidence; if by act, the wife is to be believed on her affirmation. Every *talâk-i-rajâi* becomes a *talâk-i-bâin*, after the expiration of a certain period, viz. three months, during which the parties evince no intention of resuming cohabitation.

In both kinds of *talâk*, both among the Sunnis and the Shiahs, it is necessary that at the time of the repudiation there should exist a valid marriage between the parties. With the Shiahs, it is further necessary that it should be a permanent contract of marriage (*nikâh-i-dâim*).

Generally the initiative of the *talâk* is left to the husband, but, as will be shown hereafter, the *Hâkim-i-Shara* can force him, in a variety of cases and for many specific causes, to dissolve the marriage tie.

In a *talâk-i-rajâi*, the *Hakim-i-Shara* has a right to interfere if the husband acts against the spirit of the law.



In every case where the *talâk* is pronounced on the initiation of the husband, he has to render the wife an account of the administration of her estate during their marriage, and to make over to her all her property together with the antenuptial settlement or *mahr*. On failing to do so, he is liable to a suit for damages as well as for payment of the dower.

After the expiration of the period of probation in the case of a *talâk-i-rajâi* as well as a *talâk-i-bâin*, the woman has the right to contract a fresh marriage.

Talâk-ul-Marîz (Repudiation by the Sick).

In many cases it might happen that the husband, lying *in extremis*, or suffering from a disease which eventually caused his death, wants to exercise the power of *talâk*, with a view of preventing his wife from succeeding to his estate. In order to obviate the mischief which might result from this unjust exercise of the power of *talâk*, certain rules are laid down for such cases, which require careful attention, as they mark a broad distinction between the Shiah and the Sunni schools.

“It is abominable and sinful,” says the “*Sharâya*,” “for a sick man (*marîz*) to repudiate his wife, yet if he should do so it is valid.” The Sunni “*Hedâya*” is more concise. “A sick man may divorce his wife, though he be on his deathbed.”

Among the Sunnis, when a man *in extremis* pronounces a *talâk* and dies before the expiry of his



wife's *iddat*, she is entitled to take her share in his estate. But if he die *after* the expiration of the probationary term her right of inheritance is lost.

According to the Shiah doctrines, she has a right to inherit from him if he should die any time within a year from the date of the *talâk*, whether it was *reversible* or definitive (*rajâi* or *bâin*), provided that in the meantime the woman did not marry any other person. If during this period, when the law by its own operation, preserves her right of inheritance, she contracted a second marriage, the right of succession to her first husband would be lost. Similarly, the woman would have no right to take a share in the estate of the repudiator if he should recover from the illness from which he was suffering when he pronounced the divorce, fall sick again and *then* die, unless the recovery, the relapse, and death all occur within the term of the woman's *iddat*.

The rule of the Sunni law, as mentioned before, is different. Should a man who has pronounced a *talâk-i-bâin* against his wife on his sick-bed, recover, but afterwards have a relapse and die within the term of the wife's probation, she would not inherit from him. If, however, the *talâk* has been only *rajâi* and not definitive, she would retain her right of succession.

Under the Shiah law, if a person *in extremis* were to divorce his wife under a *reversible* or *rajâi talâk*, and she were to predecease him, *before* the expiration of her own *iddat*, he would inherit from her ; but if the *talâk* were *bâin*, or if he die *after* the probationary



term, his heirs would have no right of inheritance on the ground of his right.*

Reference having already been made to the invalidity of a *talâk*, pronounced by a minor or by his guardian on his behalf, attention must be directed to the effect on a minor woman of a *talâk* pronounced against her by her legally qualified husband. There appears to be no express ruling or opinion on this point either in the Shiah or in the Sunni law books, though some of the cases given in the "*Jâma-ush-Shattât*" throw considerable light on the question. Both schools insist that the formula or *sighèh*, by which the *talâk* is pronounced, should in every case be understood by the wife. It follows, therefore, that when she is of such tender age as to be unable to comprehend the legal consequences flowing from the act of repudiation, or does not possess discretion (*rushd*), a valid *talâk* cannot be effected against her. The Shiah "*Nail-ul-Marâm*" requires *akl* (sound understanding) on both sides for the effectuation of a proper repudiation.

Can the husband exercise the power of *talâk* when the wife is an imbecile or insane? This question again is not free from difficulty. Mere imbecility does not give the husband the right of cancelling a marriage, and in the case of insanity it is necessary that it should have existed prior to the marriage, in order to furnish a proper ground for the cancellation of the marital tie.

* 1 "*Fatâwa-i-Alamgîrî*," pp. 638-63; "*Nihâyah*."



The question suggested does not, however, refer to the right of cancellation, but to the faculty of *talâk*. Under certain circumstances, and subject to certain well defined conditions, the power of dissolving the marriage relationship is vested in the husband, on his paying the dower settled on his wife. Can a husband, then, who cannot have the marriage cancelled on the ground of his wife's insanity, dissolve the connection by another process—viz. the *talâk*? As a wife's knowledge of the proceeding is necessary in every case of *talâk*, and as the law provides a means of release from a person permanently insane, it would appear by parity of reasoning, that a *talâk* pronounced against a woman who is insane—unless during a lucid interval—would be invalid.

Several cases have occurred in India in which a husband and wife, after being definitively divorced from each other, have resumed cohabitation without submitting themselves to the orthodox requirements, but these do not appear to have been brought before a court of justice.

If the validity of this cohabitation were judged by the Sunni law, it would be difficult to pronounce it lawful. If, after the resumption of intercourse, the parties, in order to escape the bann which the Sunni law imposes on the connection, were to declare that they followed the Shiah doctrines, and the husband were to state that at the time of pronouncing the *talâk* he had no *intention* of dissolving the matrimonial tie definitively, then the cohabitation would be legal.



Both schools allow the husband to delegate his power of repudiation to a third person, or to the wife herself. The delegation of option by the husband to his wife, confers on her the power of divorcing herself, but this right is restricted to the precise place or situation in which she receives the power, and falls to the ground on her removal from there, as that circumstance proves her rejection of it. Intention on the part of the husband is requisite to constitute a delegation. If the delegation be accepted by the wife and the right exercised, it would take effect as an irreversible divorce under the Hanafî law.*

* 1 "Fatawa-i-Alamgiri," p. 543; "Kanz-ud-Dakâik."



CHAPTER XII.

DISSOLUTION OF THE MARRIAGE-TIE PROCEEDING FROM
THE WIFE (KHULÂ).—MUBÂRÂT.*

PREVIOUS to the Islâmic legislation, the wives had no right to claim a dissolution of the marriage on any ground whatsoever. In special cases the power of divorce was expressly reserved in their favour by contract. As a general rule, neither the Hebrews nor the pre-Islâmic Arabs recognised the right of divorce for women. The Koran allowed them this privilege which had been denied to them by the primitive institutions of their country.

"When married parties disagree," says the "Fatawa-i-Alamgîrî," following the "Hedâya" and the "Badâya," "and are apprehensive that they cannot observe the bounds prescribed by the divine laws,

* 1 "Fatawa-i-Alamgîrî," p. 668; 2 "Fatawa-i-Kâzi Khân," p. 134; "Fusûl-i-Imâdiyah;" "Kanz-ud-Dakâik;" "Sharâya;" "Ma-fâtih;" "Jâma-ush-Shattât;" "Irshâd-i-Allâmah;" D'Ohsson; Sicé; Sautayra.



(that is, cannot perform the duties imposed on them by the conjugal relationship), the woman can release herself from the tie, by giving up some property in return, in consideration of which the husband is to give her a *khulâ*, and when they have done this a *talâk-i-bâin* would take place.”*

The mode of procedure pointed out in the above passage is founded on the principle laid down in the Koran;† and whilst it has assumed only one form under the Sunni law, under the Shiah it has taken two.

When a divorce takes place at the instance of the wife, owing to her aversion to the husband, or her unwillingness to fulfil the conjugal duties, she has to give up to her husband, either her settled dower, or some other property, in order to obtain a discharge from the matrimonial tie; such a divorce is consequently called *khulâ*. When a divorce is effected by mutual consent on account of mutual aversion, it is called *mubârât*, which operates as a release and discharge on both sides.

The Sunnis place *mubârât* under the head of *khulâ*, but the Shiahs regard it as a distinct proceeding. The essential difference between *talâk*, *khulâ*, and *mubârât*, has been already pointed out,‡ but it may be mentioned here that *khulâ* and *mubârât* take effect as an irreversible divorce.

Under the Shiah law, the four conditions necessary

* 1 “Fatawa-i-Alamgîrî,” p. 669.

† Chap. ii. v. 229; chap. iv. v. 127.

‡ See *ante* p. 334.



for the effectuation of a valid *talák* are also requisite for the performance of *khulá*. The husband must be *báligh* (adult), sane (*ákil*), must be *mukhtár* (master of his own actions, or free agent), and should have the intention (*kasd*). "To effect a valid *khulá*," says the "Sharáya," "the man must be adult in age, sane, free in choice, and it must be granted intentionally. No *khulá* is valid if granted by a boy under puberty, with or without the permission of his guardian, or by one acting under compulsion, undue influence, or fraudulent representations." A *khulá* is invalid when the grantor is in a state of intoxication, or deprived of self-control through a paroxysm of rage. The committee or guardian of a *non compos mentis* may, however, enter into an agreement with the wife to dissolve the marriage contract on her abandoning the dower. With reference to the woman herself, the same conditions are necessary as in the case of a *talák*.

In *khulá* also, the Shiahs insist on the observance of particular forms. The formulæ are required to be express in their significance, and unconditional in their character. The words must be pronounced in the Arabic language (when there is ability to pronounce that language). If any *condition* be attached to the proceeding, it falls to the ground. After the expiration of the probationary term, a *khulá* takes effect as a definitive divorce. A *khulá*, like the *talák*, requires, under the Shiah law, the presence of two witnesses of irreproachable character.

If a husband grant a *khulá* to his wife, *while their*



dispositions and tempers are still in harmony, it would not be valid. "If the husband transgress his marriage duties," says the "Nail-ul-Marâm," "the woman has the right of forcing him to accomplish those duties, or she can claim the intervention of the judge." In case of habitual discord between husband wife, an impartial woman, called *hâkima*, is selected by the *hâkim-i-shara* to try and effect a reconciliation between them.

In Trans-Caucasia, where the indigenous institutions which are the offspring of the Mahommedan law still exist, the Kâzi has the right to proceed himself to effect the reconciliation.

Among the Shâfeïs and Hanafïs, in countries where the Islâmic law is in force, the Kâzi, in case of a disagreement between husband and wife, appoints two females, one on the woman's behalf, the other on the husband's, to arbitrate between them, and to endeavour to bring about a reconciliation. If the causes of dissension continue, or if the attempts to reconcile the parties prove unavailing, then they are allowed to dissolve their marriage by any of the procedures indicated above.

Under the Shiah law, the same formalities are required for *mubârât* as for *khulâ*. A *khulâ* obtained by the guardian of a woman or by her father is valid as a reversible divorce, but she is not bound to deliver the dower to her husband, unless she herself has authorised the persons who obtained the divorce to act for her. If she authorised them to act on her behalf,



their powers would be limited within the scope of their authority; but if they acted without authority and the husband granted the *khulâ*, neither they nor the wife would be bound to pay him back the dower. If the wife be a minor, and her guardian enter into an arrangement with her husband and obtain for her a *khulâ*, it would not be valid.

The compensation which the wife, in a proceeding of *khulâ*, makes to the husband is a means to an end, viz., the dissolution of the marriage tie by obtaining his consent. This is not, however, an essential condition, for divorce is validly made when the consent of the parties to dissolve the relationship is given.

"Although the compensation agreed upon may not have been paid," says the "*Hedâya*," "a *mubârât* (signified by a man saying to his wife, 'I am discharged from the marriage between you and me,' and her consenting to it) is the same as a *khulâ*, that is to say, in consequence of the declaration of both, every claim which each had upon the other, drops, so far as those claims are connected with marriage."*

In accordance with the principle mentioned above, the Algerian Courts have decided that, when the married parties have become divorced from each other by mutual consent, the proceeding effects a complete separation, even though the wife should fail to pay the compensation agreed upon, or to abandon the settled dower, and even though the husband should

* 1 "*Hed.*" (Eng. Trans.), p. 323; 1 "*Fatâwa-i-Alamgîrî*," p. 669; "*Kanz-ud-Dakâik*."



contend that on that account the *khulâ* was not valid.

It will be observed, therefore, that mutual consent alone suffices under the Sunni law to effect a *khulâ*, though in one passage the "Hedâya" goes so far as to say that *intention* is not necessary or "essential to it, the mere mention of a compensation being sufficient in law."

As a general rule, all women who can contract a valid marriage can initiate the proceeding of *khulâ* or *mubârât*. This rule is, however, subject to several exceptions. According to the Mâlikîs and the Shâfeîs, the adult female has a personal right; she alone can institute the proceeding and consent to give the *compensation* required, though she cannot always consent to her marriage or contract a valid marriage without the consent of her guardian or *walî*. The father can enter into an arrangement of *khulâ* on behalf of his daughter who is a *sarîra* (a minor) and on whom he has imposed the status of marriage. As she is subject to the *patria potestas*, the father can consent to a *khulâ* on her behalf and abandon a portion of her dower to obtain a dissolution of the contract. In the same way, the father of a boy who is a *sarîr* (a minor) can consent to the *khulâ* on behalf of his son. The *wasî*, or the father's executor, can consent only when the powers of the father of the family are vested in him. The *sarîra* herself cannot legally enter into a *khulâ*, although the arrangement into which she enters is not necessarily, as far as the actual separation is



concerned, invalid. Al Karkhî is of opinion that when a minor wife has agreed to a separation, on condition of abandoning her dower or of paying a compensation, the separation is valid, but the stipulation as to the dower or compensation is null and void ; and if she have made any payment it must be restituted.

The woman who is devoid of intellect can, according to some of the Mâlikî doctors, enter into a *khulâ*, but Sîdî Khalîl has thrown considerable doubt on this view.

The Hanafis accord to all adult females the exclusive right of entering into a *khulâ*. They make no distinction between a woman who has intellect and one who has not. As regards the *sarîra*, they authorise the father or his executor to enter into a *khulâ* on her behalf. "If a father," says the "Hedâya," enter into a *khulâ* on behalf of his minor daughter for a certain compensation, engaging to hold himself personally responsible for its due payment, such *khulâ* is valid ; . . . but if the father were to stipulate that it would be paid by her, then she has the faculty, when she arrives at majority, to accept or refuse the arrangement. According to the *Hadîs* of the Prophet, a *khulâ* is dependent on the ratification of the woman."*

Among the Hanafis, the husband, if he be adult, may himself or by his *wakîl* (authorised agent) consent to the *khulâ*, and by his guardian if he be a minor.

The husband, who is suffering from an illness which

* 1 "Hed.," bk. iv. chap. 8.



in the language of the law is called *death-illness* or *marz-ul-maut*, which eventually causes his death, has the faculty of giving a valid consent; but as in the case of a *talâk* pronounced in *extremis*, so also in that of a *khulâ* given under similar circumstances, the wife would not be divested absolutely of her heritable rights.

A woman can, whilst suffering from a fatal illness, enter into a *khulâ*; but, as in such cases, there is a possibility of undue influence being exercised over her, the law declares that when a woman dies from an illness during which she has entered into a *khulâ*, any gift made by her in consideration of the *khulâ* shall be restored to her heirs.*

It is difficult to define with exactness the term *marz-ul-maut*. Some lawyers consider it as an illness which causes death within a year; others think it to mean an illness which incapacitates an individual from performing the ordinary avocations of life or from standing up for prayers. Neither of these definitions, however, seems entirely to cover the sense which is apparently intended to be conveyed by the words, though the Shiah jurists evidently adopted the first meaning. In some cases the disease does not terminate fatally within a year, but the mind is paralysed and the sufferer is unable to exercise his mental faculties. In other cases the illness does not affect the mind and the individual is able, more or less, to pursue his ordinary avocations. The view

* Some authors hold that the husband is bound to restore such sum, less the amount of his own share in the estate of the wife.



adopted by the "Fatâwa-i-Alamgîrî" and the "Jâma-ush-Shattât" seems to be most consistent with correct reasoning, viz. that any illness which, in the ordinary course of nature, causes death, or leads to a fatal result within the space of a year, is *marz-ul-maut*.

The consent to a *khulâ*, according to the Sunni doctrines, may be pure and simple, or conditional. When it is simple and unconditional, it produces the effect of a complete and definitive separation like a *talâk-i-bâin*. When the consent is conditional, the separation does not take place until the condition is fulfilled.* According to the Shiah law a *khulâ*, in order to be valid, must be absolutely unconditional.

According to the "Hedâya," as well as the "Badâyah," consent given by the husband to a separation on condition of the wife abandoning the dower, or paying him a certain sum, or making over to him any property, does not entitle him to cancel the *khulâ* on her failing to fulfil the contract; but he may either sue her for the amount she agreed to pay him, or set off the same against any claim she may advance against him.†

When a wife sues her husband for her dower, alleging that he has given her a *talâk*, and the husband in defence pleads that the wife entered into a *khulâ*, thereby abandoning her dower, the dispute would resolve itself into a mere question of evidence, whether or not it was at her instance the separation took place,

* 2 "Fatâwa-i-Kâzi Khân," p. 124; "Kanz-ud-Dakâik."

† 1 "Hed." (Eng. Trans.), p. 320.



and whether or not she abandoned the dower in order to obtain a release from the marriage tie. If there be no reliable evidence, the "Fatâwas" say, "the word is hers as to the dower, and his as to the maintenance," that is, she would be believed as far as her allegation is concerned that she did not abandon the dower, but the husband would not be bound to provide her maintenance during the *iddat*.*

According to the Shiah law, a *khulâ* requires to be pronounced in sacramental terms, the *sîghèh* being as necessary in *khulâ* as in *talâk*. Among the Sunnis, no particular form of *sîghèh* is needed, as long as the consent is formally expressed. They recognise one essential difference between *khulâ* and *talâk*, which it is important to bear in mind. In *talâk*, the repudiation may be conveyed by the husband in any terms, implicatively or expressly; in *khulâ*, though *kinâyèt* is allowed, the consent is required to be given in more definite language. For example, it is not sufficient for the husband to declare that he would not coerce his wife to remain with him if she would indemnify him; that *he* wished for the separation; that he would arrange with her relatives the matter of the separation, &c., because none of these expressions necessarily imply the intention of the parties to dissolve the contract. If the husband were to say that he was willing

* See the case of *Buzlur Rahim v. Intfunniessa* (7 Sevestre's Reports, p. 251), which, as Mr. Baillie very properly points out, seems to have been decided on a wrong interpretation of the law.—Baillie, p. 317.



to dissolve the union if the wife wished it, or that he would do so at once if she gave up her dower and agreed to the terms, the *khulâ* would be valid, as in these cases the intention of the parties is sufficiently manifested. In the same way, if the woman were to say, "Give me a *khulâ* in exchange for my dower," and the man were to reply, "I do," a lawful dissolution of the marriage-tie would be effected and the dower would drop.

Among all the schools, the stipulation of an indemnity is a necessary condition to the validity of a *khulâ*. If the woman give in compensation something over which she has no right, the *khulâ*, under the Sunni law, is not obligatory on the husband.

Under the Shiah law, the *khulâ* would be valid, and the husband would be entitled to recover from his wife the value of the specific article which she had stipulated for.*

As a general rule everything which may be given in dower may serve as a compensation for *khulâ*. "Whatever is lawful for dower, or is capable of being accepted as dower, may lawfully be given in exchange for *khulâ*."† The (Shiah) "*Sharâya*" uses similar words.

* The "*Sharâya-ul-Islâm*" says, "If a man should enter into a *khulâ* with his wife for a specific article which proves to be the property of another, it has been said that the *khulâ* is void; but it is better to hold that the *khulâ* is valid, and the man is entitled to the value of the specific article, or something similar to it, if it belong to the class of similars." p. 330.

† 1 "*Fatâwa-i-Alamgîrî*," p. 675; 1 "*Hed.*" (Eng. Trans.), p. 318.



It says, "Whatever may be given for dower may validly be given as indemnity for *khulâ*, and there is no limit to the same either in amount or quantity."*

The "*Mafâtih*," however, adds the following significant words to the dictum of the "*Sharâya*," "Anything that can validly be a dower, can validly be a compensation, whether it be a thing in existence or not—as suckling the child of the union, the mother's right of *hazânat*, her or her child's maintenance, &c."

The Sunni jurisconsults, in their desire to afford the wife every facility for escaping from an irksome matrimonial tie, have prescribed the following rules on the subject of compensation for *khulâ*. It is declared:—

(1) That when a *khulâ* has been entered into, or has been granted in consideration of payment by the wife of things that are *harâm*, or unlawful under the Islâmic law, such as wine, pork, carrion, &c., the *khulâ* is valid, but the stipulation is void. In such cases, the "*Fatâwa*" says, "a separation is established between the parties, but none of the *things* specified are obligatory on the wife, nor has she to restore any part of the dower," the presumption of law being that when the husband, knowing that the articles were *harâm*, agrees to accept them as indemnity, he cannot be supposed to have any intention to exact the exchange, and consequently is debarred from bringing forward a claim with respect to those articles, or demanding their value if they are destroyed by the public censor (*muh-*

* "*Sharâya*," p. 329.



tasib). In the same way, if the wife agree to give in compensation stolen property, known by the husband to be stolen, the separation would be valid but the stipulation void, and the husband would have no right to proceed against the wife if the articles be restored to the rightful owner.

Under the Shiah law, it is the same. "If the indemnity consist of things which cannot be legally possessed by the professors of Islâm, such as pork, &c., the *khulâ* is void, giving rise to the presumption of a divorce without indemnity, if the *sighèh* of divorce or *talâk* has been pronounced; but, if the *sighèh* has not been pronounced, the divorce would be absolutely null."*

(2) A *khulâ* may be entered into, under the Sunni law, for things of an indeterminate value, such as the young of an animal not yet born.†

On this point there seems to be some divergence between the Shiah and the Sunni doctrines; for the "Sharâya" says, "When the indemnity consists of the young of an animal not yet born, the *khulâ* is not valid."‡ But several examples given in the "Jâma-ush-Shattât" leave the matter involved in considerable doubt.

(3) The personal engagement of the wife to provide her own maintenance during her pregnancy, to renounce her right of *hazânat* over her children, &c.

* "Jâma-ush-Shattât."

† "Al-Karkhi."

‡ "Sharâya," p. 329.



may, according to all the schools, form the subject of indemnity for *khulâ*.

"If the indemnity," says the "Sharâya," "be the suckling of the husband's child it is valid, but the time during which it is to last must be distinctly specified; so also, if a man should give a *khulâ* for the child's maintenance, it would be valid."*

An engagement by the wife to nourish the child must be for *more* than two years; if she agrees to suckle it for two years or less, it would be no sufficient indemnity, as she is bound by law to suckle it for two years.

The indemnity is fixed by mutual agreement. The terms must be settled voluntarily on both sides. "If a man should *compel* his wife to take a *khulâ*, he would do what is unlawful; the separation would be valid, without any obligation on her part to any indemnity."†

In early times, when the dower was invariably prompt, the indemnity for *khulâ* was also required to be paid immediately when the arrangement for the dissolution of the marriage contract was entered into. At the present day, it is not considered necessary that the compensation should be paid when the *khulâ* is given, if a time for its payment is distinctly stated; it has even been held allowable on the part of the wife

* "Sharâya," p. 329.

† "Sharâya," p. 331, "If a husband should grant a *khulâ* to his wife while their dispositions and tempers are still in harmony, the *khulâ* would not be valid."



to agree to pay the amount upon her marriage with some other man.

Before proceeding further it may be as well to explain, who the parties are who may validly arrange a *khulâ*, and agree to pay the indemnity required.

In the first place, the woman herself ; in the second, her relations, friends, and even strangers may, if authorised by her, demand a *khulâ* and enter into a composition with the husband. "Any person can," says the "Fatâwa-i-Alamgîrî," "if especially authorised by an adult woman, enter into an agreement with the husband on her behalf."*

It has already been shown what the powers of a father are in respect of an arrangement made by him for a minor daughter, and it remains only to mention the extent of his authority to act for an adult daughter. A father may, with the permission or authority of his grown-up daughter, enter into a *khulâ* for her, agreeing to abandon on her behalf the dower settled on her. If a *khulâ* is arranged without her consent at the time, or subsequent sanction, and if the father has not become security for the compensation agreed upon, the transaction is not valid, and the *khulâ* is without effect. When the father has guaranteed the payment of the indemnity on his personal responsibility, then, unless the daughter subsequently ratifies what he has done, and takes the payment upon herself, she is entitled to

* 1 "Fatâwa-i-Alamgîrî," p. 685.



proceed against her husband for her dower, and he has a right against the father.*

Under the Shiah law, the husband has no right to proceed against a *wakîl* or the father, when the former has exceeded his authority, or the latter has acted without express authorisation from his daughter. In either case her right to dower remains intact, and the *khulâ* takes effect only as a single *talâk* with option of revocation on the part of the husband.†

When a compensation or indemnity has been unlawfully received by the husband, he is bound to restore it.

An indemnity is unlawful, (1) where the marriage is liable to be annulled for *initial* illegality; (2) where the marriage is annulled, in exercise of the right of option possessed by the wife; (3) where the husband has taken the initiative, and given her a *talâk*; and (4) where the wife has the right of demanding a separation from a court of justice.

In a case which was decided by the Kâzi of Constantine in Algeria on the 2nd of August 1863, the husband was ordered to repay the indemnity to the wife from whom he had separated under aggravating circumstances. The wife, it appeared, was so cruelly illtreated, that she was compelled to release herself from the marriage-tie by paying her husband four hundred francs; in fact, the husband appears to have forced her to take a *khulâ*. After the

* 1 "Fatâwa-i-Alamgirî," p. 686.

† "Sharâya," pp. 329-33.



divorce she sued the husband for the four hundred francs, which he had compelled her to pay him as compensation. The husband denied the charge of coercion and constraint, but the facts being proved conclusively, the Kâzi upheld the divorce and ordered the immediate restitution of the sum which he had obtained from the woman.*

It will not be amiss to point out here the difference between the Shiah and the Sunni schools regarding a *khulâ*, taken by a woman under the influence of threats. Under the Shiah law, when a man *forces* his wife to a composition with him for a *khulâ*, the separation takes effect only as a *reversible* divorce without any obligation on her part to pay the compensation. Under the Sunni law, however, it operates as a *definitive talâk*.

The difference between the Sunnis and the Shiahs regarding *mubârât* has been partially mentioned in a preceding page. Some further remarks will not be out of place, in order to show the extreme jealousy which the Shiah law evinces against a capricious exercise of the power of divorce which is vested in both husband and wife.

Mubârât (in law) signifies mutual discharge from the marriage tie. Under the Sunni law, when both the parties enter into a *mubârât*, all matrimonial rights which they possess against each other fall to the ground;† the same conditions are required for the validity of a *mubârât* as in the case of *khulâ* or *talâk*.

* 1 "Sautayra," p. 249.

† 1 "Hed." (Eng. Trans.), p. 323; 1 "Fatâwa-i-Alamgîrî," p. 669.



With the Shiah, it is necessary that *both* parties should, *bonâ fide*, find the matrimonial relationship irksome in order to justify their entering into a *mubârât*. If there be no mutual aversion, the *mubârât* would be invalid.

In *mubârât* also, the *sîghèh* must be pronounced *expressly* (according to the Shiah law). The *sîghèh* of *mubârât* is *باريتك علي (كذا) وانت طالق* "I have discharged you from the obligations of marriage for (such a sum) and you are separated (from me)." If the husband were simply to say *باريتك*, without using the words *وانت طالق*, the entire proceeding would be invalid; whilst if he simply say *anti tâlikun*, without using the expression about the "discharge," it would take effect as a *talâk* and he would be liable for the dower. The "Sharâya," however, adds that when there is inability to use the Arabic language, or when the parties are not cognisant of the technicalities of the law, attention must be paid to their intention. If it be clearly evident from their conduct and their words that "a mutual release" is intended, it would take effect as such, though the exact expressions may not have been used.*

In all cases where the formalities have been duly complied with, the *sighèh* has been pronounced, established, and proved, the proceeding is tantamount to a *talâk-i-bâin*.† It *definitively* dissolves the conjugal union, and the husband has thenceforward no power

* "Sharâya," p. 333.

† 1 "Sautayra," p. 250.



over his wife. "When the husband receives a compensation from the wife," says Al Karkhî, "the divorce is *bâin*, and even when it is without compensation and (consequently) *rajâi* (reversible at the option of the husband,) if during the wife's *iddat* he accept from her a compensation, the separation would be equally *bâin*."

In case of dispute between the husband and the wife regarding the terms of the composition for *khulâ* or *mubârât*, generally "the word is with her," that is, her statement is to be preferred, and the *onus probandi* will primarily be cast upon the husband.*

When a wife admits obtaining a *khulâ* from her husband on condition of paying an indemnity, but alleges that she was forced to do so by her husband, the onus of proving the allegations of coercion would rest on her.†

When a *khulâ* has been entered into, and the terms of composition settled, any addition made to the indemnity is void.

If a woman should enter into a *khulâ* on condition of maintaining the child of the union until it attains

* 2 "Fatawa-i-Kâzi Khân," p. 124; 1 "Fatawa-i-Alamgîrî," p. 678. The technical differences drawn between different forms of speech, examples of which are given in the two "Fatawas," may be left out of consideration for general purposes, for, with unimportant exceptions, when the fact of the divorce or separation is admitted and the only dispute is as regards the terms, the onus is on the husband; but when the fact is disputed, i.e. when the husband denies the divorce, the onus lies on the wife.

† *Ibid.*



puberty, the *khulâ* would be valid if it be a female child, but not so if it be a son.

Should a woman authorises a *wakîl* or an agent to enter into a *khulâ* with her husband for five hundred dirhems, and the *wakîl* were to exceed his authority and enter into a composition for one thousand, the *khulâ*, according to Al-Karkhî, would be valid and the woman would be liable only for the sum which she authorised her agent to offer.*

A different rule, however, is in force among the Shiahs. "When a woman," says the "Sharâya," "appoints an agent to enter into a *khulâ* on her behalf without expressly defining his authority, the indemnity must not exceed her customary dower, viz. the *mahr-i-misl*. If a sum in excess of the amount of the dower is agreed upon, it is void, and the separation takes effect as a *talâk-i-rajâi*, without the agent being held responsible."

The woman is entitled at any time before the *iddat* to "reclaim" the indemnity, when the *khulâ* would change its character and become a *talâk-i-rajâi*.

* This is under the Sunni law.



CHAPTER XIII.

DISSOLUTION OF THE STATUS OF MARRIAGE BY A DECREE
OF THE JUDGE.—FOR WHAT CAUSES.—LAÂN.—DIFFER-
ENCE AMONG THE SCHOOLS.

WHEN the married parties have no tangible cause of complaint against each other, but a mutual aversion due to incompatibility of temper, want of sympathy &c., they can dissolve the marriage tie by mutual agreement. When the husband is guilty of conduct which makes the matrimonial life intolerable to her; when he neglects to perform the duties which the law imposes on him as obligations resulting from marriage, or when he fails to fulfil the engagements voluntarily entered into at the time of the matrimonial contract, she has the right of preferring a complaint before the *Hâkim-i-shara* and demanding a divorce by authority of justice.

The *Hâkim-i-shara* or Kâzi has the power of granting a divorce not only for habitual illtreatment, for non-fulfilment of antenuptial engagements, for



insanity, but also for incurable impotency existing prior to marriage.

The power of the Kâzi or judge to pronounce a divorce is founded on the express words of Mohammed, "If a woman be prejudiced by a marriage, let it be broken off."* The Shiah "*Bahâr-ul-Anwâr*" also lays down that in case of *nishûz*† or *shekâk*,‡ arbitrators may be appointed to settle the disputes, or the judge may intervene, and if no settlement can be effected, the marriage ought to be dissolved.

During his own lifetime, the Arabian legislator had several times to enforce the principle in cases which arose among his followers. One notable instance has furnished an authoritative precedent for the legists of Islâm. Sabia bint Hâris, who was married to Amr, suddenly left Mecca and took refuge in the Moslem camp. Her husband was desired to follow her, which he persistently refused to do. His marriage was thereupon annulled, and Sabia was allowed to contract a union among the people she had joined.

The obligations, which are imposed on the husband by the status of marriage, have been sufficiently explained in a previous chapter. For further details the curious student of the Mahommedan law is referred to the "*Kitab-ul-Mustatraf*."

Divorce by act of justice, as mentioned before, may be claimed whenever the husband neglects to perform

* "*Sahîh-i-Bukhârî*."

† Refusal to fulfil conjugal duties.

‡ Violence, cruelty, disagreement, etc.



his obligations. It may also be claimed when he refuses to fulfil the terms of the contract, or when he is unable to consummate the marriage. Furthermore, it may be claimed if the husband slander his wife, or pronounce an injurious assimilation against her; for example, if he compare her to his mother or any other female relation within the prohibited degrees (*zihâr*), or if he take a vow to abstain from her for four months (*Ilâ*).

The cases decided by the Algerian Courts,—numerous instances of which are given by Sautayra and De Ménerville,—show that a wife is entitled to a divorce for the following, among other reasons:—

(1) When the husband leaves her without any means of subsistence.

(2) When he deprives her of her raiment.

(3) When he forces her to beg for her living.

(4) When he allows her to suffer from starvation or want.

(5) When he quits the conjugal domicile without making any provision on her behalf.

(6) When he persistently neglects to visit her.

(7) When he forces her to labour at work of a kind which is considered degrading to a woman in her position.

(8) When he does not provide her with a habitation.

(9) When he has several wives and does not treat them all equitably.

(10) When he treats her habitually in a cruel manner.



(11) When he is in the habit of beating her or threatening her with bodily injuries.

These causes entitle a wife to claim a divorce, even where it appears that the means were resorted to, with the object of forcing her to enter into a *khulâ*.

Mere inability to provide maintenance is not a sufficient ground for asking for a divorce. When the husband is possessed of means and is able to provide for the support of both himself and his wife, and wilfully refuses to do so and neglects her, then only can she apply for a divorce. The principle which is followed by the Criminal Courts in British India, in making orders for separate maintenance, furnishes a guide to the rule of the Mahommedan law as applied to cases of divorce. For example, s. 232 of Act IV. of 1877 (the Presidency Magistrates' Acts) declares that when a man who is able to support his wife refuses to do so and neglects her, the magistrate may grant her, on her application, a separate maintenance. The same rule would be applied by the *Hâkim-i-shara* in the matter of divorce. He has the power of granting a divorce, when the refusal or neglect is wilful and unjustifiable. But if the husband be indigent and has neither the means to provide for her support nor ability to work, she cannot obtain a separation as a matter of right.

The refusal to maintain, in order to entitle a woman to obtain a divorce, must be a continuing offence, and must not refer to past conduct. When the husband expresses at the time of application his willingness to



maintain the wife, and it appears to be *bonâ fide*, she is not entitled to a separation, though the Kâzi has a discretion in this case.

Arrears of maintenance are not due unless there is an order of the magistrate or Kâzi fixing the amount, or the rate has been previously determined by private agreement between the parties. In these cases the wife may recover the arrears due by an action in the Civil Courts.

If the husband has abandoned the conjugal domicile without taking any measures for the support of the wife during his absence, or if he has left her absolutely without any means to support herself, the wife is entitled to apply to the Kâzi for a divorce. Upon receiving her application, the *Hâkim-i-shara* is authorised to adjourn the case for thirty days, and to issue a notification for the appearance of the defaulting husband, or some person or persons on his behalf. Should an appearance be entered either by the husband or any other person acting on his behalf, the Kâzi would direct an inquiry regarding the truth or falsity of any defence that might be urged. In default of such appearance, or on failure by the husband or his representatives to show that the wife has sufficient means to maintain herself with, the Kâzi is authorised to make the order for a divorce.

Should the husband, however, have left any property either in the hands of the wife, or in trust, or deposit, or invested in trade or partnership, the judge has the power to order that the woman's maintenance should



be provided from such property, or from the income thereof.

The onus in all these cases lies, in the main, on the wife, to prove that she has been deserted and left without means.

The order for divorce is always made subject to the option of the wife. She may either continue subject to the conjugal rights, or accept a separation on the ground of desertion. If she accept a separation, it would take effect as a definitive divorce.

If the absent husband can himself, or through others, provide his wife with maintenance, she would not be entitled to a separation, unless his absence amounts to *desertion* within the meaning of the Mahommedan law.* If an offer should be made by the husband's father to maintain the wife, the same conditions regarding the amount and its mode of payment would apply, as in the case of the husband himself.

Equality and justice being essential conditions in the treatment of wives, should a husband who has more than one wife neglect his duties towards any one of them, that one would be entitled to a separation in consequence of the neglect.

The Court of Algiers has held that when a husband habitually uses vile expressions towards his wife, it is a sufficient cause for divorce. In the same way, if he accuses her of having led an immoral life previous to

* The Mahommedan law insists that cohabitation is a mutual obligation on the parties. If the husband were persistently to refuse to cohabit with his wife, this would amount to desertion.



her marriage, she would be entitled to a separation. She is equally entitled to a separation, when he charges her with unfaithfulness to him and yet refuses to establish the accusation by a formal proceeding (*la'ân*).

The wife has a right to apply for and obtain a divorce when the husband habitually insults her parents or her relations, or leads an infamous life, or associates with women of evil repute, or attempts to force her to lead an immoral life and take up her abode with prostitutes, or introduces a concubine into the conjugal domicile, or threatens to kill the wife, or beats her, or disposes of her property, or makes her life miserable by cruelty of conduct, even when it does not amount to physical illtreatment.

A simple allegation of the wife, unsupported by independent testimony, is not sufficient in law to establish any of the charges above mentioned. When her statement is supported by the evidence of trustworthy witnesses, or corroborated by outward marks of cruelty, the Kâzi is bound to grant her a separation.

It is no defence to a claim for divorce on the ground of cruelty, that the cruelty was the result of the wife's own conduct. For example, if a man were to say that he beat the wife cruelly because she blasphemed the Mussulman religion, or because she was unfaithful to him, it would not be a sufficient defence in law.

A judgment of the Kâzi of Algiers, upheld by the Superior Court, throws considerable light on this branch of the subject. The husband, in the case referred to, had beaten his wife so severely that he



wounded her in two places. Before the Kâzi, he urged that he inflicted the beating because she allowed a stranger to visit her during his absence. The Kâzi, after examining the wounds, declared that, notwithstanding the wife's adultery, the husband had exceeded his correctional powers, and therefore the woman was entitled to a divorce.

A separation by decree of the judge can take place also, when the husband fails to carry out or to abide by the terms of the matrimonial contract. All the lawyers agree in holding, that when the husband recedes from his engagements, or refuses to act in conformity with them, the wife is entitled to a divorce. The conditions (*shurât*) or stipulations which may be validly entered into at the time of marriage have been already pointed out.* The most frequent of these conditions is, that the husband shall not take a second wife during the continuance of the first marriage. Should the husband, acting contrary to this express stipulation, contract a second union contemporaneously with the first, the first wife would be entitled to a divorce, and the husband would become liable for the whole of the deferred dower.†

In considering this branch of the law it is well to mention the fact, that while the French in Algeria

* See chapter on Marriage.

† This provision of the law acts as a practical check on polygamy in Mussulman countries. The difference between the Sunnis and the Asna Asharya branch of the Shiah has been pointed out in a previous chapter.



have, with remarkable foresight, utilised the indigenous institutions and used them as so many levers for the improvement of the Algerian people, the British in India, with hardly commendable wisdom, have persistently and characteristically ignored or abolished the old institutions, which they found existing in Hindustan when they seized the government of the country. The Kâzi's courts, which dealt with the matrimonial cases of the Moslems, have, with many other useful institutions, been swept away by the iconoclastic movement inaugurated under the British rule. The difficulties which were settled formerly by a simple reference to the Kâzi, without employment of advocate or pleader, now eat into the core of Moslem society without remedy or cure. To give an example, if a husband at the time of his marriage made a stipulation with his wife that he would not contract a second union during her lifetime, and subsequently infringed the stipulation validly entered into, the Kâzi had the power to compel him to abide by his agreement or to dissolve the first marriage on the application of the prejudiced party. Under the British rule, there is no machinery for affording the latter relief, though probably a wife may apply to the civil courts for, and obtain, an injunction to restrain the husband from infringing the terms of his contract with her.

In the case of *Badarunnissa v. Mafiatulla*,* it

* 7 Bengal L. R., A.C., p. 227.



was held that if the wife divorced herself under a stipulation of the character referred to, a suit on the part of the husband for restitution of conjugal rights would not lie.

The wife is entitled to a separation not only for non-fulfilment of antenuptial agreements, but also for breach of any stipulations which may have been entered into, with the sanction of the Kâzi, after marriage between the husband and herself. For example, where the husband has bound himself before the Kâzi not to illtreat the wife any more, or to provide her with a separate maintenance, and he fails subsequently to keep to his engagement, the wife would have a right to ask for a divorce.

Would a wife be entitled to a divorce in a case where the husband's absence is involuntary, for example, when he is in prison?

An order of the Court of Algiers dated the 19th of July 1865, has authoritatively settled the question. It declares that "under the Mussulman law a wife of an individual detained in prison has not the right of obtaining a divorce by the mere fact of his imprisonment, if she receive during his enforced absence her proper maintenance."*

In another case, the same court upsetting the judgment of the Kâzi, made an order to the following effect:—"The Kâzi is in error in applying the principles of the Mussulman law relating to a husband

* 1 "Santayra," p. 265.



who has disappeared to the present case ; for, in point of fact, the husband Ahmed bin Kara has not disappeared, that it is known where he is at the present moment, that news has been received from him, that she has up to this time received her maintenance from the husband's brother ; she is accordingly not entitled to a divorce, the order of the Kâzi is therefore set aside."

Ali Yezîd-al-Kazwîni and Ali Abu'l Hassan, two Shâfeî jurists, are of opinion that when the imprisonment lasts over five years, the wife has the right of demanding a dissolution of her marriage, and after the necessary *iddat* of contracting a fresh union.

The Shiah's hold that in case of a husband's disappearance, a woman is entitled to remarry after four years, if during that period no trace of him has been found.* The Mâlikîs and Hanbalîs agree with the Shiah's, but the Shâfeîs require that the woman should wait for her husband's return or reappearance for seven years, after the lapse of which period, she is entitled to remarry by authority of a rescript or order from the Kâzi.

Abû Hanîfa's doctrine is so startling that even the

* The "Jâma-ush-Shattât" says, "An order from the *Hâkim-i-Shara* must be obtained before the second marriage is contracted." In India, it is probable that a declaration made before the magistrate to the effect that the husband had disappeared for four years without leaving any trace behind, would be sufficient to satisfy the requirements of the law, for the order of the magistrate is not necessary to give validity to the marriage, but simply to attest the *bonâ fides* of the wife and the new husband.



followers of his school are obliged to conform to the Shâfeî teaching instead of his own. He declares that a woman ought to wait one hundred and twenty years!

Abû Yusuff and Mohammed are no less unreasonable in their views; according to one, the term is ninety years, and to the other seventy years.

The Hanafi lawyers, in order to escape from the absurdity of the position into which the dicta of their masters lead them, invariably decide cases arising among their own sect according to the Shâfeî principle. When a husband is proved to have been a *mafkd-ul-khabar** for the space of full seven years, they allow a woman to contract a second union.

Zihâr.

In early times, and before the promulgation of the Islâmic law and faith in the peninsula of Arabia, it was customary among the Arab husbands to repudiate their wives and cast them adrift on the world by calling them mothers or sisters. The frequency of repudiations by "injurious assimilations," to use the felicitous expression of M. Sautayra, had assumed a mischievous magnitude at the time of the Prophet's appearance, and had tended to degrade the morality of the Arab tribes beyond any other custom, excepting, perhaps, the custom of the *Nikâh-ul-makt*, "the abominable marriages."

* One of whom no trace can be found.



The Arabian law-giver expressly forbade the use of "injurious assimilations," or vile expressions of any kind towards the wife. A husband making use of such expressions rendered himself liable to expiation. The usual expiation for the sin of vile language used towards the wife, consisted in enfranchising a slave, or feeding the poor, or fasting for two months.

Should the husband compare his wife to his mother or sister, or *any other female relation within the prohibited degrees*, expiation would become incumbent on him *only* if the comparison or "assimilation" was intended "disrespectfully." "If he declare," says the "Hedâya," "that in making the comparison his intention was only to show respect to his wife, no expiation would be necessary."*

The custom of repudiation by the use of "injurious assimilations" had taken such deep root in the manners of the pagan Arabs, that, in order to nullify the evil consequences resulting therefrom, and thus in process of time to throw it into desuetude, the Founder of Islâm prescribed the rules which are embodied in legal treatises, but which, on the whole, have no practical importance in the present day. Their only real value consists in the fact that they enable us to perceive the circumstances under which a woman, who is subjected habitually to gross and vile expressions, would become entitled to a separation on that ground alone. The habitual use of language of the character above described is considered as an outrage on public morals

* 1 "Hed." (Eng. Trans.), p. 306.



DISSOLUTION OF THE STATUS OF MARRIAGE. 387

and the decency of married life; a woman, therefore, to whom any expression of an immoral character has been used has the option, under the Sunni law, of asking for a dissolution of the marriage tie by an order of the Kâzi, unless the husband formally expiates the sin in the way pointed out.

Under the Shiah law, the judge has not the power of dissolving the matrimonial relationship on the ground of the wife having been "disrespectfully and vilely" compared by the husband to a female relative of his within the prohibited degree. The "Sharâya" says, "If a vile expression (*zihâr*) be used towards a wife, she may choose either to submit to it, in which case no other person has a right to object to her doing so, or she may bring the matter before the judge. When she adopts the latter course, the husband must be allowed to choose, whether he will make an expiation or separate from his wife, and three months is to be allowed him to make up his mind. The judge, however, has not the power should the husband allow the time to expire without doing either of these things, to compel him to divorce the wife, or to grant a dissolution by a decree of the court."*

* "Sharâya," p. 335. All these rules have now only a historical interest, as throwing considerable light on the manners and customs of the Arabs in the time of Mohammed. The term *zihâr* is as unknown in Mussulman society, now-a-days, as it is among foreigners. It must not be supposed, therefore, that because there exist directions in legal treatises against the use of injurious expressions towards a wife, such expressions are habitual among Moslems.

Ilâ, the Vow of Abstinence.

Like *Zihâr*, the custom of *Ilâ*, or the vow of abstinence, which was in vogue, as well among the pre-Islâmic Arabs as among the Hebrews and Christians settled in Arabia, has fallen into complete desuetude, but as reference is made to it in Mussulman works of law, attention may briefly be drawn to the subject in these pages.

Prior to the Islâmic legislation, a vow of continence made by a husband, and kept inviolate by him for a certain length of time, took effect as an absolute repudiation. The wife had no voice in the matter. Custom recognised no right on her part to question her husband's faculty to divorce her in this manner.

Mohammed stigmatised this custom as a gross outrage on the wife. As in the case of *zihâr*, a husband who took such a vow laid himself open to the penalty of expiation, if he resumed intercourse in the interval and before the expiration of the term of the vow. The term of *ilâ* is four months. A vow for less than this space of time is of no effect in the eye of the law. If the *ilâ* is kept inviolate for four months, the Hanafî law presumes that the husband has no intention of resuming cohabitation, and attaches to the vow the effect of a definitive and complete separation. The husband loses, after the lapse of this period, all conjugal rights over the wife, who, on her side, becomes entitled, should the husband desire to resume cohabitation, to claim a dissolution of the marriage by an



order of the Kâzi, who can make an order dissolving the marriage.

Under the Shiah law, an *ilâ* kept inviolate for four months takes effect only as a *reversible* or *rajâi* separation. The parties are at liberty to resume intercourse whenever they like. Nor has the *Hâkim-i-shara*, among the Shiahs, the power which the Kâzis possess among the Hanafis. He has no power to compel the husband to divorce the wife, or to dissolve her marriage by a decision of his *mahkama* (court). But when the man is recusant and refuses restitution of conjugal rights as well as a separation, and thus seriously prejudices her interests, the Hâkim has the power of imprisoning and "straitening" him, until "he either returns to her or grants her a divorce."*

Laân.

Under the Mussulman law, a charge of adultery preferred by a husband against his wife can only be established by the direct testimony of four witnesses to the fact. From the nature of the offence, however, the cases in which ocular and direct evidence is available are extremely rare. In order to obviate the evils which would necessarily result from a denial of all redress to the injured husband, in those numerous instances where he is morally convinced of the guilt of his wife, but has no direct testimony to establish it, or when he alone is cognisant of the fact, the law has prescribed the proceeding by *laân*.

* "Jâma-ush-Shattât."

It must be added, however, that in prescribing the proceeding by *laân*, the law has in view not only the interest of the husband but also that of the wife.

Under the Mussulman law, a person who slanders another is liable to the *hudd-ul-kazf*, "the specific punishment for scandal." But when a man maligns his wife and accuses her of adultery, in the majority of cases he escapes the punishment usually inflicted for slander. In order, therefore, to subject the slanderer to some definite penalty for an unjustifiable accusation, as well as to enable the wife to clear her character by a public and solemn denial of the charge (*dafa-ul-âr*), it was provided that when a charge of adultery was made against a woman, the accuser and the accused were bound to proceed to the Kâzi, and mutually take the sacramental oath prescribed by the law.

As M. Sautayra points out, in countries where the Mahommedan law is not in force, the proceeding by *laân* has fallen into disuse. The Algerian Kâzis, notwithstanding that the practice of *laân* is becoming obsolete, still continue to administer the Mussulman law in those cases where the parties choose to institute the proceeding.

The Procedure of Laân.

The disapprobation, with which the proceeding of *laân* is regarded by Moslem jurists, is shown by the directions contained in the "Sharâya" and the "Fatawa." The "Sharâya" says, "It is not lawful for a husband to accuse his wife on a mere supposition



of guilt ;” and the “Fatâwa ” directs that when the accuser and the accused appear before the Kâzi, he should admonish them to abandon the proceeding. Should they persist, one in making the accusation and the other in insisting upon the charge being proved, then alone should the judge administer to them the sacramental oath prescribed, “invoking the curse of God ” upon each other.*

Under the Shiah law, it is only when the husband has no evidence to offer but his own, that he may proceed by *imprecation* against the wife. Under the Sunni law, he may, even when he has corroborative testimony, institute the proceeding by *laân*.

Laân may be instituted by the husband with two objects, either to establish a charge of adultery against his wife, or to disavow the parentage of a child born in wedlock, which again resolves itself into an accusation of unfaithfulness to the marriage bed on the part of the wife. As the conditions requisite for the validity of the proceedings in the two cases are slightly different, it is as well to consider them separately. For instance, under the Shiah law, *imprecations* can be mutually pronounced in the affirmation and denial of an accusation of adultery, *only when* the husband alleges that *he has had ocular demonstration of the fact but has no other proof of it*.† “ It follows from this,” says

* 1 “Fatâwa-i-Alamgiri,” p. 698 ; 2 “Fatâwa-i-Kâzi Khân,” p. 153 ; “Fusûl-i-Imâdîyah ;” “Sharâya,” pp. 348, 349.

† “Jâma-ush-Shattât ;” “Irshâd-i-Allâmah ; “Sharâya,” pp. 346, 347.



the "Sharâya," "that there can be no *laân* for a charge of adultery in the case of a blind man, though he may make an imprecation for the disavowal of a child."*

All the schools agree in requiring that the husband who institutes the proceeding by *laân* shall be adult and sane. The Sunnis insist further that he shall be a Mussulman. The Shiah treatises do not expressly mention that Islâm is a necessary qualification on the part of the husband, and the cases cited in the "Jâma-ush-Shattât" leave it in doubt, whether a *zimmi* husband is qualified to take the *laân*. Judging by analogy, however, it would seem that non-Moslem subjects of Shiah states would not be denied the power of instituting a proceeding by *laân*, if they were not proclaimed Atheists.

Under the Hanaffi law, "only those persons who are competent to give testimony in Court are competent to take the *laân*."† "So that," continues the "Fatâwa," "it cannot be taken by the married parties when either or both of them have previously undergone the specific punishment for slander, or when one is an absolute slave, or an infidel, or dumb, or under puberty, or mad."‡ The blind and the deaf, however, are not precluded from taking the *laân*.

Among the Hanaffis, it is required further, that the wife should be a Moslemah of chaste character (*muh-*

* "Sharâya," p. 347.

† 1 "Fatâwa-i-Alamgîrî," p. 698.

‡ *Ibid.*



sina). "When she is a person of loose character, or the parties have lived together only under a semblance of right," she is not entitled to claim the benefit of the proceeding by *laân*.

The Shâfeîs and the Mâlikîs agree with the Shiahs in allowing the dumb to take the oath of imprecation.* "The imprecation by the dumb is valid," says the "Sharâya," "when their meaning can be ascertained by intelligible signs."

The Shiahs agree with the Hanafîs in requiring that the wife should be a person of irreproachable character, in order to take the *laân* validly. They, however, go further than the Hanafîs in holding that she should be adult and sane and "free from deafness and blindness." In making Islâm a condition on the part of the wife, they are in agreement with the Hanafîs.†

Among the Hanafîs, if a man slander his wife who is a *zimmiah* (non-Moslemah) or a slave, he cannot be subjected to the formality of imprecation. Under the Shiah law, "*Laân* is established between a free man and a slave wife, so that if he were to malign her he would be liable to *imprecation*."‡

The Shafeîs and the Malikîs agree with the Shiahs with reference to the latter principle. They make no

* 1 "Hed.," p. 351; "Sharâya," p. 348; "Kitâb-ul-Anwâr."

† The Akhbâri Shiahs and the Mutazalas apparently differ from the Usûlî on this point. They seem to hold that it is not necessary that a woman should be a Moslemah in order to exercise the right of *laân*.

‡ "Jâma-ush-Shattât;" "Sharâya," p. 348.



difference between the free and the slave, in the exercise of the right of *laân*. Among them a *zimmiah* or non-Moslemah occupies the same position in the eye of the law as a Moslem woman. They differ from the Shiâhs and the Hanafîs, in holding that the mere fact of a woman being a person of questionable character ought not to debar her from taking the oath of imprecation, or exempt her husband from establishing formally the accusation he brings against her.

According to the Mâlikîs and the Shâfeîs, when a non-Moslemah wife is charged with adultery, she is entitled to take the oath in the church, if she be a Christian, and in the synagogue if a Hebrew.

Under the Shiah law, when the husband is able to produce testimony, but declines to do so, he is not entitled to proceed by imprecation. When he swears that he actually saw the wife in the guilty act, but has no corroborative evidence, the oath should be administered to him and to the wife respectively. If the husband refuse to take the oath, he makes himself liable to the punishment for slander. If the wife refuse to take the oath, the Kâzi is authorised to dissolve the marriage by a formal decree issued under his hand and seal. "It is a condition of *laân* that the wife should demand it; and if the husband refuse to take the oath, the judge is empowered to imprison him until he submits or retracts, in which case he becomes liable to the punishment for slander. Similarly, if the woman prove contumacious, and refuse to take the oath, the Kâzi has the power of sending her to



prison until she takes the oath, or admits her guilt." These provisions of the Hanafî law do not, however, seem to be enforced by the Hanafî Kâzis of Algeria, whose decisions alone furnish us with leading principles. In a case decided by the Kâzi of Bôn, on the 17th of September 1862, the proceeding was instituted by the husband.*

The legal consequences resulting from the proceeding by imprecation.

When both parties have taken the oath in the prescribed form, or the charge has been conclusively established, the Kâzi must draw up an order of separation between the parties; and in accordance with such decree, the husband must divorce his wife. If he refuse to do so, the judge himself is to pronounce a divorce between them. The marriage, however, continues in existence, with all its concomitant rights until the judge has made the order.

All the schools are agreed in the opinion that a proceeding by *imprecation* can be validly effected only before the Kâzi or *Hâkim*, and that until he has made his order dissolving the marriage it continues intact. There is a passage in the (Shiah) "*Sharâya*" which leads to the inference, that if the parties were to appoint a private individual as arbitrator, his decision or award would have the same legal and binding effect as that of the authorised judge.†

* 1 "*Sautayra*," p. 322.

† "*Sharâya*," p. 349.

The cases in the "Jâma-ush-Shattât," however, point to the conclusion, that the proceeding should be instituted in the *Murâfa-i-Mujtahid-i-shara* (in the Court of the *Mujtahid-i-shara*, otherwise, the lawfully constituted judge).

Under the Shâfeî, the Mâlikî, and the Shiah doctrines, parties separated by an order of the judge in a proceeding by imprecation "are perpetually prohibited to each other,"* that is, they are debarred from remarrying. Under the Hanafî law, however, if the husband retracts the accusation and undergoes the punishment for slander, or if it is found subsequently that, at the time of the proceeding, one or the other of the two parties was labouring under some *legal disability* which would have invalidated the *laân*, or if either of them should apostatise and then return to Islâm, they can contract a remarriage.

The formalities required for a *laân* in order to constitute a valid disavowal of a child, are the same as those observed when the charge is one of simple adultery, the only difference being that the formula is varied to suit the requirements of the question.

It must be added, however, that it is not necessary to comply with all the formalities of *laân* in order to obtain a valid dissolution of the marriage tie, on the ground of the wife's infidelity. In the case already referred to, decided by the Kâzi of Bôn, the husband appeared before that officer and preferred an accusation

* 1 "Hed.," p. 349; 3 D'Ohsson, p. 112; "Sharâya," pp. 349-351; "Kitâb-ul-Anwâr;" 1 "Fatawa-i-Alamgîrî," p. 640.



against his wife, who on being cited admitted her guilt. The Kâzi made a decree dissolving the marriage, and ordered the woman to reimburse the dower she had received from her husband.

Similarly, when a false accusation is preferred against a woman, and the husband is unable to establish the charge, the woman is entitled to claim a divorce from the court. The two cases cited by Sau-tayra are conclusive on this subject. In the first case Yehia ben Mohammed accused his wife of misconduct. She denied the charge and cited him before the Kâzi to establish it by formal evidence. On failure of the husband to do so an order was made, at the instance of the wife, dissolving the marriage.

In the other case, which was decided by the Court of Algiers on the 13th of February 1871, the husband demanded a cancellation of the contract, on the ground that the wife had been guilty of immorality prior to her marriage. The wife denied his allegation and claimed a divorce. The husband failed to establish the accusation, and the Kâzi accordingly pronounced a divorce in favour of the wife.*

Talâk-ul-Innîn.

The right of the woman, under the Mussulman law, to a cancellation of the marriage on the ground of her husband's impotency is similar in all respects to her right under the English law. The analogy, especially

* If the marriage had been cancelled at the instance of the husband, he would not have been liable for any dower.



between the Shiah law and the English common law, is close enough to deserve the attention of the students of comparative jurisprudence.

The wife is entitled to claim a divorce on the ground of her husband's impotency, if she was unaware of the infirmity prior to the marriage. If she accepted the husband with a knowledge of the fact, that he was impotent and physically incompetent to consummate the marriage, she has no right of divorce.

If the infirmity supervened after consummation, the wife has no right to ask for a divorce.

Under the Sunni law, the wife is entitled to a dissolution of the marriage for what is called in English law impotency *versus hanc*. It makes no difference in her right to obtain an annulment of the marriage, whether the incapacity of the husband is *only especial* in her case, and whether he is able to have sexual intercourse with other women or not.

Under the Shiah law, if the man be able to have intercourse with other women, but not with the wife in question, she has no right.

The wife is bound to exercise her right immediately on becoming aware of her husband's infirmity. Delay in exercising the right, or in asking for a dissolution of the marriage on this ground, would give rise to the presumption of waiver. Such presumption, however, is *rebuttable*. Circumstances may be shown which rendered it impossible for her to urge her claim immediately after the marriage. For instance, the husband may have been absent from the wife since his



marriage ; she may have had no means for preferring her claim, &c.

A claim for the dissolution of the marriage on the ground of impotency is to be preferred always before the Kâzi or the *Hâkim-i-shara*.

A divorce granted by the *fatwâ* of the *mullahs* is absolutely illegal and invalid. The "Jâma-ush-Shattât" says, that no proceeding for divorce on the ground of physical incapacity, is valid without recourse to the *murâfa* of the *Hâkim-i-shara*.

When a woman prefers a charge of impotency against her husband, the Kâzi investigates the complaint and examines the parties. If the wife be a virgin, a jury of matrons is empanelled to examine whether she is *virgo intacta*. If her assertion be found to be true, the case is adjourned for a year commencing from the date of the order of adjournment. If the husband consummate the marriage in the interval, the wife's petition would be dismissed after the lapse of the period fixed by the judge. If he, however, fail in his marital obligations, the wife is entitled to a divorce.

Under the Sunni law, she would be entitled to her *full dower* in case there has been a *valid retirement* of the parties into the nuptial chamber. If there has been no *such retirement*, the Hanafis allow her only a moiety of her dower. The Shiahs and the Shâfeîs, in any case, give her only half the dower.

When the woman herself is not *apta viro*, she is not entitled to a divorce. If the woman is not a virgin,



and the husband swear that he has had connubial intercourse with her, she has no right to a divorce.

The Sunnis and the Shiahs are generally agreed regarding the procedure to be observed in a case of impotency brought before the judge. According to the "Jâma-ush-Shattât," an order of the *Mujtahid-i-shara*, who acts as Kâzi in Shiah countries, is always necessary. It ought to be added, however, that the "Sharâya" seems to hold a contrary opinion. It says, "True, in establishing impotence, a judge is required to fix the period allowed to the man, in such cases, to test his inability, yet at the expiration of the prescribed period, the woman can cancel the marriage by herself if no cohabitation have taken place in the interval."*

The dicta of the "Jâma-ush-Shattât" is more conformable to right reasoning, and is generally followed in Shiah states.

* "Sharâya," p. 288.



CHAPTER XIV.

THE STATUS OF INFANCY.—PERSONAL EMANCIPATION.—
EMANCIPATION OF PROPERTY.—INDIAN ACT IX. OF 1875.

THE disabilities under which minors labour are not peculiar to the Islâmic law. In most other systems, the attainment of majority carries with it the personal emancipation of the minors, and also vests in them the capacity of dealing with their property in any way they choose, but under the Mussulman law *personal* emancipation does not necessarily lead to an emancipation of property.

As a matter of fact, the Islâmic system recognises two distinct periods of majority, one of which has reference to the emancipation of the person of the minors from the *patria potestas*, and the other to the assumption by them of the management and direction of their property.

These two periods are designated as *sin-i-bulûgh* and *sin-i-rushd*, the age of puberty and the age of discretion.

Among the Hanafîs and the Shiahhs, puberty is pre-



sumed on the completion of the fifteenth year; among the Málíkís on the completion of the eighteenth year. The Hanafís and the Shiahs generally consider *rushd* (discretion) and *bulûghiyèt* (puberty) to go together, and therefore the personal emancipation of minors, which occurs on their attaining puberty, carries with it the emancipation of their goods from the hands of their guardians. They then become entitled to take over the charge of their own property.

There are cases, however, in which a boy or a girl may have arrived at puberty and may yet not be sufficiently discreet (possessed of understanding) to assume the direction of his or her property. In such cases, the Mahommedan law separates the two ages of majority, and whilst according to the minor personal emancipation from the right of *jabr*, takes care, in the minor's own interest, to retain the administration of his or her property in the hands of the legal guardian.

If a minor should not be discreet at the age of puberty, he or she is presumed to be so on the completion of the eighteenth year, unless there is any direct evidence to the contrary:

The principle of two distinct, and yet concurrent, periods of majority has been adopted in the Indian Majority Act (Act IX. of 1875). Section 2, cl. *a* of that Act, declares "Nothing herein contained shall affect the capacity of any person to act in the following matters, (namely) marriage, dower, divorce, and adoption." Section 3 provides that "Subject as



aforesaid," every minor who should not be a ward of Court, whether under Act XL. of 1858 or the Court of Wards Act (B.C.), should be deemed to attain his or her majority on the completion of the eighteenth year, and "not before." But every minor of whose *person* or *property* a guardian "has been" or shall be appointed by a court of justice, and every minor under the jurisdiction of the Court of Wards "shall be deemed to have attained his majority, when he or she shall have completed the age of twenty-one years, and not before."

It will be seen, therefore, that as far as the principle of the Act is concerned, it is analogous to the principle of the Mahomedan law in recognising two distinct periods of majority, one for the emancipation of the person of the minor, the other for the emancipation of the property of such minor. Instead of leaving the age of *rushd*, when the management of the minor's property should be confided to him, in a variable condition, it has fixed, in the case of all minors for whom a guardian has not been appointed by a court of justice, or who are not under the jurisdiction of the Court of Wards, the age of eighteen as the age of discretion or majority.

In the case of those minors for whom a guardian has been appointed by a court of justice, it goes beyond the Mussulman law, and does not allow the emancipation of their property until they have completed the twenty-first year.

As far, however, as the personal emancipation of



minors is concerned, the Act leaves untouched the provisions of the Mussulman law. It has specially excepted from its operation the capacity of the Mahommedans "to act in the matters," to use the phraseology of the statute, "of marriage, dower, and divorce." The extension, therefore, of the age of minority by the Act does not extend the duration of the right of *jabr*.

The father's power to impose the status of marriage upon his minor children cannot be exercised, the Act notwithstanding, after the completion of their fifteenth year or on their arriving at puberty.

Similarly they can, if Hanafis or Shiahs, enter into contracts of marriage without the consent of their guardians,* and if any contract of marriage be entered into on their behalf, it is dependent on their express ratification.

In the case of a minor contracted in marriage by a guardian other than the father or grandfather, a doubt arises as to whether he or she would be bound to exercise the *khyâr-ul-bulûgh* ("the right of option") on the completion of the fifteenth year, or whether the right would come into operation after the completion of the eighteenth year. It would appear from the wording of the Act, that as the provisions of the Mahommedan law regarding the capacity of persons in matters of marriage, dower, and divorce are left intact, a minor so contracted in marriage may validly exercise the

* For Mâlikî doctrines, see chapter on the Right of *Jabr*.



right of option on arriving at puberty. Should the right not be exercised then, it is difficult to suppose that it would fall to the ground, or that its not being exercised would be construed to imply acquiescence. As the Act declares that minority should extend in certain cases up to the eighteenth year, and in other cases up to the twenty-first, and as it nowhere says that a right acquired by any exceptional law, if not exercised immediately according to the requirements of that law, should drop, it may perhaps be assumed, that no court of justice would debar a minor from exercising the *right of option* to cancel a contract of marriage entered into on his or her behalf, by any guardian other than the father or the grandfather, even though it may not be claimed or enforced until after the completion of the age of majority fixed by the Act.

Under the Mussulman law, every individual upon attaining puberty is vested with the power or capacity of entering validly into *legal transactions* of every kind affecting his or her status, as well as property. The Act has postponed the capacity regarding any dealing with property, until after the age specified by the legislature. But as it makes an exception in the case of contracts affecting the status of individuals, the result is that if a person on arriving at puberty were to enter into a contract of marriage and *make a settlement*, such a settlement would be valid, as a necessary consequence of the marriage contract. In the same way, the statute leaving untouched the power of

divorce under the Mahommedan law, if a Mussulman husband, who was an adult under the Mussulman law and a minor under the Act, were to exercise his power and divorce his wife, he would make himself legally liable for the dower, though the Act would protect him from incurring any liability which did not arise from any contract or breach of contract affecting status. These are some of the difficulties which are not unlikely to arise under the Indian Majority Act, owing to the exceptional clause referred to.

There are other difficulties to which attention may briefly be directed. The statute, it will be remembered, applies to all persons domiciled in British India. There are cases, however, in which a Mussulman, native of Arabia, Persia, Afghanistan, or Turkey, may acquire a domicile in British India, without expressly abandoning his original domicile. In such cases, it is almost impossible to ascertain, with any degree of certainty, whether the person in question has any definite intention of permanently residing in British India. The Persian community in Calcutta furnish the best example of the difficulty suggested. Most of them have been settled in the Presidency town and its suburbs for several generations. They work and live and intermarry there; but none of them seem to have abandoned the intention of, some time or other, returning to their mother-country. It is somewhat doubtful how the question of majority would be governed with reference to them. As yet there has arisen no case among them to enable the



courts to pronounce authoritatively whether they should be considered domiciled in British India or not. Probably, when the matter actually comes before the courts, there will be no difficulty in deciding in the affirmative.

As the Mâlikîs presume puberty only on the completion of the eighteenth year, there is less likelihood of a conflict between their doctrines and the direct provisions of the Act, or the indirect conclusions or results which may spring from it. For example, in the case of a Mâlikî minor, for whom no guardian has been appointed by a court of justice, or who is not subject to the Court of Wards, the legal disability under the Act as well as the Mâlikî law would expire simultaneously, and the minor in question would acquire the direction and management of his property together with his personal emancipation. If he be a ward of court, the emancipation of his property from tutelage would be deferred three years. A Shiah or Hanafî minor, on the contrary, would not acquire the control of his property, in one case in three, and in the other, in six years after the attainment of his majority under his own law.



CHAPTER XV.

GUARDIANSHIP OR TUTELAGE.—ITS OBJECT AND SCOPE
UNDER THE MAHOMMEDAN LAW.—THE FATHER THE
PRIMARY GUARDIAN.—TESTAMENTARY GUARDIANS.—
INDIAN ACT XL. OF 1858.

GUARDIANSHIP or tutelage comprehends, (1) the direction or care of the person of the infant, and this arises when the *hazânat* and the guardianship are vested in one and the same person; (2) a simple supervisory direction over the person of the infant, when the *hazânat* is vested in another person; and (3) the administration and care of the property of the minor.

In pre-Islâmic times, the preservation and management of the goods of minors were confided to tutors or guardians taken from among the members of the family; but in the absence of all public authority to exercise a salutary control over them, cases of misappropriation and embezzlement were so frequent, as necessitate the introduction of most stringent rules for the protection of minors in the Islâmic legislation.

The Koran teems with denunciations against the



gross malpractices frequent throughout the Peninsula at the time of Mohammed; and the rules contained in it furnish the foundation for the Mussulman law on the subject of guardians and wards. The following passages contain some of the rules bearing on the subject, and throw considerable light on the condition of morals in Arabia, about the sixth and seventh century of the Christian era.

“Restore to the orphans,” says the Koran, “when they come of age, their *substance*; do not substitute bad for good,* nor devour their substance by adding it to your own, for this is an enormous crime.”†

It forbade the waste of the property of wards by their guardians,‡ and directed that the tutors may take a reasonable and moderate gratuity for their labour, but not more; “Let him who is rich abstain entirely from the orphan’s estate, and let him who is poor take thereof according to what shall be reasonable.”§

It further imposed on the guardians the duty of rendering accounts. “And when ye deliver unto your wards their property, call witnesses thereof in their presence. Surely they who devour the possession of orphans unjustly shall swallow fire hereafter.”||

* That is, Take not what ye find of value among their effects to your own use and give them worse in its stead.”—Baizâwî.

† Koran, chap. iv. v. 2

‡ *Ibid*, chap. iv. v. 156.

§ Or, as Baizâwî explains, “no more than what shall be sufficient recompense for the trouble of education and pupillage,” chap. iv. v. 6. Sale.

|| Koran, chap. iv. v. 6.



It was also ordained, that the Kâzi should exercise a vigilant supervision over the guardians in the management of their wards' property.

In consequence of the principles which regulate the right of guardianship, being based essentially on the express teachings of the Koran, there is little room for divergence between the Shiah's and the Sunnis on this branch of Mussulman jurisprudence.

Guardians are either *natural*, *testamentary*, or *appointed*.

The first and primary natural guardian is the father. Among the Hanafis, when the father is dead the guardianship of his minor children devolves upon his executor. When he has died without appointing an executor, but his own father is alive, the tutelage of the minor children is allowed to the grandfather; when the grandfather also is dead, the guardianship devolves on *his* executor. Among the Shiah's, if the grandfather is alive, he is entitled to the guardianship in preference to the father's executor. In default of the natural as well as the testamentary guardians, viz., the father and his executor and the grandfather and his executor, the obligation of appointing a tutor or Curator, for the preservation and management of the minors' property, rests on the Kâzi or judge as representative of the government or "Sultan." Among the Hanafis, if a person sufficiently qualified to undertake the guardianship of the minors, or, to use the language of Act XL. of 1858, "willing and fit to be entrusted with the charge" of the minors'



property, can be found among the male agnates of the deceased father, such person should be appointed by the Kâzi in preference to a stranger, but no relative other than the father or grandfather has any right to interfere in any way, with the property of a minor, unless appointed by the judge.*

The father has, at all times, the amplest power to make by will such dispositions, as he may think best relative to the guardianship of his minor children and the protection of their interests.

In order to be valid, however, the appointment of an executor or a testamentary guardian must be made by the father at a time when he is in full possession of his senses. If, at the time of making the appointment, he was in a state of imbecility, or had been for a long time unable to conduct his business owing to mental deficiency, the appointment would be invalid.†

Similarly, in order to be valid in law the appointment must be in favour of a person who is "adult and sane." If the guardian appointed by the father is a minor or a lunatic, the appointment is *ipso facto* void, and all acts committed by the minor guardian, before his removal by the judge, in exercise of the authority received from the testator are inoperative in law.‡

If the guardian becomes imbecile or insane after the appointment, the tutelage conferred by the father

* 6 "Fatawa-i-Alamgîrî," p. 223.

† See the judgment of the Kâzi of Tlemcen, dated the 30th of December, 1863; 1 Sautayra, p. 360.

‡ 6 "Fatawa-i-Alamgîrî," p. 214.



is voided, and the right of appointing a guardian devolves on the Kâzi.

Whether a minor who is appointed a guardian, and is not removed from his office by order of the judge, would validly exercise the rights of guardianship on attaining majority is a question on which there seems to prevail great divergence of views. Abû Hanîfa replies in the negative. Abû Yusuff and Mohammed and the Western Imâms hold a contrary opinion, and think that if the minor is not removed from the guardianship before attaining majority the power granted by the testator revests in him on his becoming *sui juris*.^{*} This opinion is in force among the Indian Hanafis.

A *Harbî*† (a native of any hostile country at war with the country of the testator,) can under no circumstance be appointed the guardian of Moslem children, or the children of the non-Moslem subjects of a Mahommedan State.

The position of a *zimmi*, or a non-Moslem, subject to the same sovereign as the testator, is different. Under the Hanafi law, if a *zimmi* is appointed a guardian, he can validly exercise his authority and the powers given to him by the deceased, until he is removed by the judge. It is in the discretion of the

^{*} 6 "Fatawa-i-Alâmgirî," p. 214.

† Baillie translates this word as *alien*. As a matter of fact, the term signifies "a resident of the *Dâr-ul-Harb*," as contradistinguished from the *Dâr-ul-Islâm*. See chap. ii. on the "Conflict of Law."



Kâzi whether he should be removed or not, though it is recommended in the interest of the minors that he should be removed.* All acts committed by him in exercise of his power are lawful, until the appointment is cancelled by the Kâzi.†

Among the Mâlakîs and the Shâfeîs, a *zimmi* may lawfully be appointed the guardian of the property of minors, though not as the guardian of their person.

Under the Shiah law, the question is involved in great doubt and difficulty. The "Jâma-ush-Shattât" says in matters of guardianship a *zimmi* stands on the same footing as a *harbi*. Probably this may be construed to refer to the guardianship of the person of the infants.

But when the mother is the testamentary guardian, she may, though a non-Moslemah, validly exercise, according to all the schools, the rights of guardianship over the person as well as the property of the minors. The Shiahs make an exception as to the right of *jabr*.

The appointment by the testator of his own slave as the guardian of his infant children is valid in law; but if the appointee is another man's slave, or if some of the testator's children are adult, the appointment is, in the first case, void, and in the other, voidable, and liable to be annulled by the judge.

The appointment of a "profligate," that is, a person who bears notoriously a questionable character in the

* 3 D'Ohsson, p. 124.

† 6 "Fatâwa-i-Alamgîrî," p. 214; "Fusûl-i-Imâdiyah;" "Kanz-ud-Dakâik."



public walks of life, *from whom danger may be apprehended to the interests of the minor*, is invalid and liable to be set aside by the judge, under the Shiah as well as the Hanafî law. But all acts committed by such a person before cancellation of his appointment, are lawful if not transparently fraudulent.* Subject to the foregoing conditions, the father can appoint at his discretion a man or a woman, a relative or a stranger, to be the guardian of his minor children. His choice cannot be impugned, except on the ground that the tutor so appointed is acting prejudicially to the interests of the wards.

When the Kâzi has appointed a curator (or *mukkad-dam*) to take charge of the property of minors, and it subsequently appears that the father had confided the guardianship by his last will and testament to another person, the appointment made by the Kâzi would be withdrawn and the father's choice upheld.†

A verbal appointment of an executor, if supported by sufficient testimony, is valid in law.

A mother is not a natural guardian. She is entitled to the custody of the persons of her minor children, but she has no right to the guardianship of their property. If she deals with their estate without being

* "Jâma-ush-Shattât;" 6 "Fatâwa-i-Alamgîrî," p. 212.

† See the judgment of the Court of Algiers, dated 29th January, 1863.—Sautayra. "If a judge, not knowing that the deceased has appointed an executor, appoints another, the executor of the deceased is the lawful executor, and not the nominee of the judge." 6 "Fatâwa-i-Alamgîrî," p. 213.



specially authorised by the judge or by the father, her acts should be treated as the acts of a *fazûlî*. If they are to the manifest advantage of the children they should be upheld, if not they should be set aside.

A mother, therefore, whether Moslemah or non-Moslemah, can be validly appointed executrix of the father, and when so appointed is entitled to exercise the rights and powers which the law vests in testamentary guardians.

A testamentary guardian stands in *loco patris* in every matter relating to the welfare of the minors and the care and preservation of their property. In certain cases, and especially when the appointment of the *wasî* or executor is *general in its nature*, the father's or grandfather's executor may delegate the trust to his own *executor*.*

In Algeria, however, the Kâzis have held that such delegation, in order to be operative, must be confirmed by the Kâzi or judge.

The mother has no right to appoint a guardian for her minor children. In the case of legitimate children, the power of appointing a tutor to take charge of their property belongs exclusively to the father; in the case of illegitimate children, to the Kâzi or judge. But when the mother acts as the general executrix of the father, she may validly leave by will the charge of the children to her own executor.

When, however, an executor has been appointed by the

* 6 "Fatâwa-i-Alamgîrî," p. 223; "Jâma-ush-Shattât."

mother to take charge of her minor children, and also of movable and immovable property left by her, such executor has no power to sell anything that the minors may have inherited from their father, whether real or personal, or whether the property was involved in debt or not. But he may lawfully dispose of, for the benefit of his wards, the movable property inherited by them from their mother, *but not the immovable property*.* If the estate left by her is involved in debt, and the debt is such as to absorb the whole estate, he is authorised to sell the entire property, but not otherwise.†

When a guardian has been appointed by a court of justice, or there is a testamentary guardian, the mother has no right to interfere with the administration of the estate of the minor. She is at all times, however, entitled to institute a suit in her own name for the protection of the interests of her children. When, therefore, a guardian is dealing fraudulently with the property of the minors, or is embezzling or wasting their estate, she has a right to ask for the assistance of the judge to remove or restrain him.

The Mahommedan law carefully and jealously defines the powers and duties of guardians, natural, testamentary, or appointed.

A guardian is authorised to sell the movable property of his ward for an *adequate* consideration, and

* "Nor," adds the "Fatawa," "lawfully buy anything but food (*at ta'am*) and raiment (*al kiswat*)."
 † 6 "Fatawa-i-Alamgirî," p. 223

† 6 "Fatawa-i-Alamgirî," p. 223.



invest the proceeds in a "profitable undertaking" for the benefit of the minor. "A guardian may sell or purchase movables on account of his ward, either for an equivalent, or at such a rate as to occasion an inconsiderable loss, but not at such a rate as to make the loss great and apparent, because the appointment of an executor being for the benefit of the orphan, he must avoid losses in as great a degree as possible; but with respect to an inconsiderable loss, as in the commerce of the world it is often unavoidable, it is therefore allowed to him to incur it, as otherwise a door would be shut to the business of purchase and sale."* Similar opinions are expressed in the "Jamâ-ush-Shattât" and the "Fusûl-i-Imâdiyah."

Inadequacy of consideration, which on the face of it bears the marks of fraud, or when the inadequacy is so *considerable* as to occasion serious injury and detriment to the interests of the minor, or when it is the result of culpable negligence on the part of the guardian, will avoid any transaction entered into by him on behalf of the ward, and make him liable for its consequences. It remains, however, for the Kâzi in his discretion to consider whether a consideration is adequate or not, or whether a particular transaction shall be held to be prejudicial to the interests of the ward or otherwise. If the transaction has been entered into *bonâ fide* with due care and attention, the guardian would not be held responsible for any un-

* 4 "Hed." (Eng. Trans.), p. 553.



toward consequences which may have resulted from it, contrary to his expectation and forecast.

A guardian is allowed to borrow money for the *support and education* of his ward, even if he have to pledge the minor's property. All debts contracted *validly* and *bonâ fide* for that purpose, must be paid out of the minor's estate, or by the minor when he or she comes of age.

It is lawful for a guardian to trade on account of his ward, but in doing so he must be careful not to speculate beyond the bounds of *ordinary prudence*, or to engage in transactions which he has reason to believe are hazardous in their nature.*

A guardian is bound to keep his accounts separate from those of his ward, when the capital of both is engaged in the same trade or business.

A testamentary guardian, or a curator appointed by the Kâzi, is not allowed to pledge the goods of his ward "*into his own hands*" *on account of a debt due to himself*, nor "*into the hands*" of any person over whom he exercises control or parental authority; "*for a guardian, being merely an agent, cannot of course have a double capacity in contracts.*"†

According to the "*Hedâya*," a father *may pledge* the *movable* property of his minor child to himself for a debt due from the child to himself, or he may pledge it to another on account of a debt of his own, remain-

* "*Fusûl-i-Imâdiyyah.*"

† 4 "*Hed.*" (Eng. Trans.), p. 214.



ing, however, always liable for the value of the goods to the child.*

Other jurists seem to disagree with the author of the "Hedāya" in this latter view. According to them, the father stands in the same position as any other guardian; that is, it is not lawful either for him or for a tutor to pay off his own personal debts with the goods of the minor, or to pledge them on account of debts.†

Some jurists think that it is lawful for the father to pledge the goods of his son for a debt jointly incurred by father and son. If, therefore, the pledged goods be lost, a father is bound "to compensate his son by the payment of a sum equivalent to his own share of the debt."

Abû Yusuff and several others have doubted the correctness of this view, holding that the father has no right to mix up his own property with that of his child, or to pledge the latter for a debt due from both, as "this is likely to lead to confusion."

These principles have reference to movable property alone. With reference to the *real* or *immoveable* property of the ward, the powers of guardians are more limited and circumscribed.

(a) A guardian *may not* sell his ward's real property "into his own hands" or into the hands of anyone connected with him, under any circumstance.

(b) He may sell it to a *stranger* for double its

* 4 "Hed." (Eng. Trans.), p. 215.

† "Fusûl-i-Imâdiyyah;" "Durr-ul-Mukhtâr," p. 846; "Jâma-ush-Shattât;" 4 "Hed.," bk. xlviii, chap. ii.



value, or where it is to the *manifest* advantage of the ward.

(c) He may also sell it when there are some general provisions in the *wasīyet* (will) of the testator, which cannot be carried into effect without the sale of the property.

(d) When the property is required to be sold for the purpose of paying off the debts of the testator, which cannot be liquidated in any other way.

(e) When the income accruing from the estate is not sufficient to defray the expenditure incurred in its management and the payment of the *kharāj* (land revenue).

(f) When it is in imminent danger of being destroyed or lost by decay.

(g) When the minor has no other property, and the sale of it is *absolutely* necessary for his maintenance.

(h) When it is in the hands of a usurper, and the guardian has reason to fear there is no chance of restitution.*

If the immovable property of a minor is sold *bonâ fide* for an adequate consideration, with the object of investing the proceeds safely and for an increased interest, its sale would be held valid upon a liberal construction of the law.†

As a general rule, the powers of the testamentary guardian are subject to the same limitations, and extend to the same degree as the powers of the testator.‡

* 6 "Fatawa-i-Alamgiri," p. 222; "Fusûl-i-Imâdiyyah;" "Jâma-ush-Shattât;" "Kitâb-ul-Anwâr;" "Durr-ul-Mukhtâr," p. 846.

† "Fusûl-i-Imâdiyyah;" "Radd-ul-Mukhtâr;" "Jâma-ush-Shattât."

‡ 6 "Fatawa-i-Alamgiri," p. 224.



The Shiah law is in general accord with the Sunni law in respect to the powers of guardians. A few of the general principles stated in the "Mabsût" may usefully be inserted here :—

(1) The testamentary guardian or executor must be major, sane, professor of Islâm and of good manners.

(2) A minor cannot be appointed a guardian or executor by himself, but may validly be appointed with another. In the last case, he can act only on attaining majority.

(3) In the preceding case the adult tutor can act singly up to the majority of the minor guardian.

(4) A woman can be appointed an executrix or a testamentary guardian of minors.

(5) A *zimmi* cannot be appointed the guardian of Moslem children.

(6) The testamentary guardian cannot delegate the guardianship to his own executor, unless expressly authorised by the testator.

(7) If the grandfather is alive the father cannot leave the guardianship of his minor children to an outsider, unless the grandfather is notoriously inimical to the interests of his grandchildren.

The provisions of the Mussulman law relating to the appointment of guardians and their powers and duties must be read side by side with the provisions of Act XL. of 1858.

Section 2 of this Act declares that, "except in the case of proprietors of estates paying revenue to government who have been or shall be taken under



the protection of the Court of Wards, the care of the persons of all minors (not being European British subjects) and the charge of their property shall be subject to the jurisdiction of the Civil Court."

Section 3 provides that, "every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin, or otherwise, may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate." It makes a proviso, however, in favour of estates of small value.

This section does not take away the right of the mother to institute a proceeding to restrain a guardian from wasting the estate of his ward. Section 19 provides specially that, "It shall be lawful for any relative or friend of a minor, at any time during the continuance of the minority, to sue for an account from any manager appointed under this Act, or from any person to whom a certificate shall have been granted under the provisions of this Act, or from any such manager or person after his removal from office or trust, or from his personal representative in case of his death, in respect of any estate then or formerly under his care or management, or of any sums of money or other property received by him on account of such estate."

Section 7 provides for the appointment of the guardians in the following terms:—"If it shall appear that any person claiming a right to have charge of



the property of a minor is entitled to such right by virtue of a will or deed, and is willing to undertake the trust, the Court shall grant a certificate of administration to such person. If there is no person so entitled, or if such person is unwilling to undertake the trust, and there is any near relative of the minor who is willing and fit to be entrusted with the charge of his property, the Court may grant a certificate to such relative. The Court may also, if it think fit (unless a guardian have been appointed by the father), appoint such person as aforesaid or such relative or any other relative or friend of the minor, to be guardian of the person of the minor."

When a title to a certificate is not established to the satisfaction of the Court by any person claiming under a will or deed, and if there be no near relative willing and fit to be entrusted with the charge of the property of the minor, the Court is authorised to appoint either the Public Curator or some other person to take charge of such property. When it appoints a guardian for the property, it is also bound to "appoint one to take charge of the person and maintenance of a minor."*

Section 18 thus defines the powers of the guardians so appointed, or to whom a certificate has been granted. It declares:—"Every person to whom a certificate shall have been granted under the provisions of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may

* Ss. ix. and xi.



collect and pay all just claims, debts, and liabilities due to or by the estate of the minor. But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained."

In the case of *Abbâsi Begum v. Rajrup Koer*,* it was decided by Ainslie and Macdonnell, JJ., that a guardian *de facto*, who has not taken out a certificate under the Act, has no larger powers than a guardian *de jure* duly appointed under it. In a later case, however, a Full Bench of the Court have held a contrary view. They have decided that it is only when a guardian takes out a certificate, that his or her power becomes circumscribed within the limits imposed by Section 18 of Act XL. of 1858. The position and powers, therefore, of a Mahomedan guardian, testamentary or natural, who does not take out a certificate, will be judged by the principles of the Mahomedan law. But, as has already been amply shown, the Mussulman law is extremely solicitous for the interests of minors. There can, therefore, be little doubt that the Courts in India will be guided in the determination of questions arising in Moslem families, by the equitable principles of construction adopted by the Algerian Kâzis and the Court of Algiers.

* 4 "Ind. L. R." Cal. Series, p. 33.

INDEX.

A.

Abstinence, vow of, 388.
 Abu Abdulla Mâlik ibn Ans, 20.
 Abu Hanîfa, 19.
 Acknowledgment, the doctrine of, 166.
 — by a woman, 170.
 Adoption, 166.
 Agents for marriage, 245.
 Ahl-ul-Hadîs, 21.
 Ahl-ul-hawâ, or freethinkers, 137.
 Ahl-ul-itizâl, 16.
 Ahl-ur-rai wal kiyâs, 22.
 Ahkâm-ul-azwâj, 89.
 Akhbâri, 18.
 Al-hajb, 102.
 Al-hajb en al-asl, 102;
 Al-hajb en bâz al-farz, 102.
 Al-hazânat, 195.
 Ali, the family of, 11.
 Al-Kafât, or equality in marriage, 263.
 Al-mirâs bil valâ, 61.

Âmân, the, 127.
 Ancient customs, 121.
 Antenuptial settlements, 298.
 — miscellaneous principles, 319.
 Apostasy, its effect on marriage, 276.
 Arab customs, ancient, 121.
 Asabâh, 45.
 — table of, 122.
 Asabâh-be-nafsihî, 48.
 Asbab-i-Tahrîm, 219.
 Asnâ-Asharyas, 18.
 Asûbat, 55.
 Aul, the doctrine of, 105.

B.

Bait-es-sadakât, 145.
 Bait-ul-Mâl, 15, 93, 95, 98.
 — explanation of term, 145.
 Bait-ul-ganimet, 145.
 Balad-i-myet, 65.
 Balâd-i-Islâm, 129.

British India, the status of
 Moslems domiciled in, 129.
 Bulûghyet, or puberty, 180.

C.

Cancellation of marriage, causes
 of, 271.
 Capacity to contract marriage,
 216.
 Children, maintenance of, 288.
 — mother's right to custody
 of, 195.
 Conditions of marriage, 246.
 Conflict of law, 124.
 Conjugal domicile, 285.
 Consanguinity, succession of re-
 lations by, 73.
 Consent to marriage, 233.
 — express or implied, to mar-
 riage, 239.
 Custody of children, mother's
 right to, 195.
 Customary dower, 305.

D.

Dain mahr, 298.
 Dâr-ul-harb, 126.
 Dâr-ul-Islâm, 126.
 Disavowal of child by father,
 100.
 Disqualifications from civil
 rights, 39.
 Disqualified parents, 69.
 Dissolution of marriage contract,
 330.
 Dissolution of marriage by de-
 cree of judge, 374.
 — why effected by a judge,
 376.

Distant kindred, 112.
 Divorce, 34, 330.
 — legal effects of, 347.
 — capacity of pronouncing a
 valid, 337.
 — for sickness, 349.
 — by mutual consent, 355.
 — by wife, 354.
 — at instance of wife, 355.
 Domicil, conjugal, 285.
 Double inheritance, 118.
 Dower, customary or specified,
 301.

E.

El-farz, 67.
 Emancipation, personal, 401.
 — of property, 405.
 Equality in marriage, 263.
 Eviction from inheritance, 95.
 Exclusion, principles of, 102.

F.

Father, the primary guardian,
 410.
 Filiation, 166.
 Form of marriage, 225.

G.

Gestation, recognised periods of,
 150, 151.
 Ghibat-ul-munkata, 188.
 Guardian, the primary, 410.
 — natural, 410.

Guardian, appointed, 413.
 ——— testamentary, 411.
 Guardians in marriage, 191.
 Guardianship or tutelage, 408.

H.

Hâdis, 9.
 Hâkim-i-Shara, 34, 35.
 Hanafi school, table of the different orders of succession under, 108.
 Hanîfa, 19.
 Harem, the, 31.
 Hazânat, 195.
 Heirs of the first class, 73.
 ——— of the second class, 79.
 ——— of the third class, 86.
 ——— by virtue of *nasab*, 73.
 Hibas, or gifts, 130.
 Husbands and wives, succession of, 89.

I.

Ibn-i-Hanbal, 21.
 Iddat, or probation, 170.
 Ithrâm, its influence on marriage, 222.
 Ijmaâ-i-Ummat, 10.
 Ikrâr, or acknowledgment, 167.
 Iâ, or vow of abstinence, 388.
 Illegal marriages, 254.
 Illegitimacy, a bar to succession to property, 100.
 Imâmat, the, 5.
 Imâmias, 18.
 Imâm Mohammed's table of succession, 110.
 Impotency, 397.

Imprecation, procedure of, 391.
 ——— legal consequences of, 395.
 Increase, a technicality of inheritance, 106.
 Infancy, the status of, 401.
 Infidelity evicts from inheritance, 95.
 Inheritance by *sabab*, 61.
 ——— by *valâ*, 61.
 ——— by *nasab*, 59.
 ——— double, 118.
 ——— by virtue of relationship, 67.
 ——— by virtue of Koranic injunction, 67.
 ——— eviction from, 95.
 ——— synoptical table of Shiah, 107.
 Invalid marriages, 260.

J.

Jabr, the right of, 179.
 Jahez or Jahâz, 33, 328.
 Jamâet, the, 5.
 Jazia, or capitation tax, 145.
 Jehâd-i-Sharâi, 37.

K.

Kabâret, 67.
 Kâbin-nâmeh, or marriage deed, 229.
 Kharâj, 145.
 ——— or taxes, 127.
 Khilwat-i-Sahîh, 250.
 Khojahs of Bombay, 18.
 Khulâ, 34, 355.
 Khulafâi-râshadîn, 38.
 Khyâr-ul-bulûgh, 269.



Kiyâs, 10.
Koran, the basement of all Mus-
sulman law, 3.

L.

Laân, 150, 153, 162, 389.
—— legal consequences of, 395.
—— the procedure of, 390.
Lakit, or foundlings, 177.
Law, conflict of, 124.
Legal disabilities to marriage,
219.
—— effects of marriage, 252.
Legitimacy, the status of, 148.
Local forms of marriage, 226.

M.

Mahr, 298.
Mahr-i-misl, 301, 307.
Mahr-i-muajjal, 308.
Mahr-i-mussamma, 307.
Mahr-i-muwajjal, 308.
Mahr-i-sunnat, 307.
Mahr-i-tafwiz, 311.
Mahr-i-tahkîm, 312.
Maintenance of children, 288.
—— of wife, 279.
Mâlik ibn Ans, 20.
Mâlikî school, table of Asabâh
according to, 122.
Marriage, agents for, 245.
—— capacity to contract, 216.
—— causes of its cancellation,
271.
—— causes of its dissolution by
judge, 376.
—— conditions of, 246.
—— consent to, 233.

Marriage, dissolution of, 330.
—— dissolution of, by decree of
judge, 374.
—— effect of apostacy on, 276.
—— equality in, 265.
—— express or implied consent,
239.
—— guardians in, 191.
—— influence of pilgrimage on,
222.
—— legal disabilities to, 219.
—— legal effects of, 252.
—— local forms of, 226.
—— prohibited degrees, 220.
—— proof of, 252.
—— the form of, 225.
—— testimony of, 241.
—— the status of, 215.
—— under Moslem law, 24.
—— valid retirement necessary
to, 250.
Marriages, illegal, 254.
—— invalid, 260.
Married parties, their rights and
duties, 278.
Marz-ul-maut, 361.
Mawlâ-ul-Mawâlât, 58.
Mewânah-ul-Irs, 95.
Mirâs-ul-ansâb, 73.
Mirâs-vali-ul-atq, 61.
Mohammed, the change he ef-
fected in the status of women,
22.
Mother, her right to custody of
children, 195.
Mubârât, 34, 355, 370.
Mujtahid, 15, 64, 66.
Mukâtib, 56.
Murder evicts from inheritance,
95, 99.
Mustâmins, 128.
Mussulman law, based on the
Koran, 3.
Mutazalas, 16.
Mutilation, 38.



N.

- Nasab, 59.
— classes of heirs by virtue of, 73.
— how established by Shiah law, 160.
— under Shiah law, 174.
Nikâh-al-Makt, 23.

O.

- Option of puberty, 269.

P.

- Patria potestas, the, 179.
Personal emancipation, 401.
Pilgrimage, its influence on marriage, 222.
Polygamy, 25.
Proof of marriage, 252.
Property of intestate, 65.
Puberty, option of, 269.

R.

- Re-acknowledgment of child after disavowal, 101.
Residuaries, 48, 120.
Return, technicality of inheritance, 80, 81.
— the doctrine of, 117.

S.

- Sabab, 59, 61.
Sadâk, 298.
Safih, of unsound mind, 135.
Sahâm-bil-karâbet, 67.
Sarîr, or minor, 135.
Settlements, antenuptial, 298.
Shâfeî, 20.
Shâfeî school, table of Asabâh according to, 122.
Shâheds, or witnesses, 141.
Sharâi marriage, 227.
Sharers, 45, 120.
Shiah and Sunni schools of law, date of divergence, 6.
— inheritance, synoptical table of, 107.
— origin of name, 8.
Shiahs, sub-sections of, 15.
Slavery, 36.
— evicts from inheritance, 95, 100.
Status of legitimacy, 148.
Succession, barred by illegitimacy, 100.
— barred by infidelity, 95.
— barred by murder, 99.
— barred by slavery, 100.
— different orders of, under Hanafî school, 108.
— general rules of, 105.
— of heirs of the first class, 73.
— of heirs of the second class, 79.
— of heirs of the third class, 86.
— of husbands and wives, 89.
— of relations of consanguinity, 73.
— table of, according to Imâm Mahommed, 110.
— to property, 41.



Sunni and Shiah schools of law,
date of divergence, 6.
— origin of name, 8.

T.

Tahrîm-un-nasab, 221.
Talâk, 34, 35.
— capacity of pronouncing a
valid, 337.
— legal effects of, 347.
— or divorce, 333.
Talâk-ul-innîn, 397.
Talâk-ul-marîz, 349.
Tâsib, 58.
Testimony to marriage, 241.
Tutelage or guardianship, 408.

U.

Urfi marriage, 227.
Ushr, 145.
Usûli, 18.
Uterine relations, 51, 115, 120.

V.

Valâ, 54.
Valâ-i-zâmin-ul-jarîrah, 61.
Valâ-ul-atq, 54, 62.

Valâ-ul-Imâm, 62.
Valâ-ul-mawâlât, 55.
Valid retirement, necessary to
marriage, 250.
Vested interests, 118.

W.

Wakfs, or endowments, 130.
Wakîls, or agents for marriage,
245.
Walad-ul-malâinah, 100, 162.
Walad-uz-zinâ, 100, 161, 162.
Walî-i-jâbir, 193.
Wife, her maintenance, 279.
Witnesses to marriage, 241.
Wives and husbands, succession
of, 89.
Women, their position under
Islâmic law, 23.

Z.

Zav-il-arhâm, 45, 52.
Zav-il-furûz, 45.
Zekkât, 145.
Zihâr, 385.
Zimmi, 127, 145.
Zoujyat, 61.
Zû-farz, 67.
Zû-karâbet, 67.



ERRATA.

- Page 22, line 25, *for* "Tâbiûn," *read* "Tabiîn."
- Page 29, line 5, *for* "Motazalite," *read* "Mutazalite."
- Page 66, line 22, *for* "Jama-ash-Shattat," *read* "Jâma-ush-Shattât."
- Page 90, bottom of page, *read* "See *seq.* p. 261."
- Page 100, line 21, *for* "as a nullus filius," *read* "as nullius filius."
- Page 128, line 5 from bottom, *for* "tableaux," *read* "tableau."
- Page 129, line 15, *for* "39 Geb. III. c. 71," *read* "21 Geo. III. c. 70."
- Page 138, line 2 from bottom, *for* "Sharh Vikâyah," *read* "Sharh Vikâyah."
- Page 163, last line, *for* "Lois Musulmans," *read* "Lois Mahométanes."
- Page 230, lines 8 and 16, *for* "Fâtiah," *read* "Fâtiha."
- Page 239, line 13, *for* "express or implied consent," *read* "express and implied consent."
- Page 276, line 4, *for* "Native Converts' Marriage Act," *read* "Native Converts' Marriage Dissolution Act."
- Page 296, line 2 from bottom, *for* "s. 232," *read* "s. 234."
- Page 328, line 1, *for* "trousseaux," *read* "trousseau."
- Page 377, line 15, *for* "s. 232," *read* "s. 234."
- Page 397, line 4 from bottom, *for* "in all respects," *read* "in most respects."

